Transnational issues in cyberspace

A project on the law
relating to jurisdiction

JURISDICTIONAL ASPECTS OF CYBERSECURITIES

WORKING GROUP ON SECURITIES

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The purpose of this paper is to explore jurisdictional aspects of Internet-based transactions in securities, including issuing and trading in securities in cyberspace and the use of cyberspace in complying with informational requirements imposed by securities laws. The paper first describes the conflicts between the Internet and traditional patterns of jurisdiction.[1] Next, it explores Internet jurisdictional issues as they have been applied to cybersecurities in the U.S. and elsewhere up to this point. Third, it recommends reexamination of certain existing jurisdictional principles and poses potential modifications.

I. Conflicts Between the Internet and Traditional Patterns of Jurisdiction.

A. Conflicts Arising out of the Internet As It Exists in 1999.

As will be explained in more detail below, basic jurisdictional principles were established long before computers or the Internet. Such principles have been essentially geographically based. They have therefore been more difficult to apply in the context of the Internet. Information over the Internet passes through a network of networks, some linked to other computers or networks, some not. Not only can messages between and among computers travel along much different routes, but "packet switching" communication protocols allow individual messages to be subdivided into smaller "packets" which are then sent independently to a destination where they are automatically reassembled by the receiving computer.[2]

The Internet is wholly indifferent to the actual location of computers among which information is routed, hence there is no necessary connection between an Internet address and a physical jurisdiction.[3] Moreover, Web sites can be interconnected, regardless of location, by the use of hyperlinks. Information that arrives on a Web site within a given jurisdiction may flow from a linked site entirely outside that jurisdiction.[4] Finally, notwithstanding the Internet's complex structure, the Internet is predominately a passive system; Internet communication only occurs when initiated by a user.

B. Increased Conflicts That Will Arise From the Future Development of the Internet.

As discussed, the rules of jurisdiction over activities on the Internet are evolving out of principles that predated the personal computer age. Repeatedly, courts and regulators have analogized the Internet to telephone or print media in analyzing jurisdictional issues. Whether this approach should continue in the future is a serious issue, because the Internet of today is but a glimmer of what lies ahead in digital communications.

Not only is the new global marketplace incredibly complex, but the growth and pace of change in the communications industry are unlike anything since its inception. Each minute, over five million e mail messages are now being sent around the world. While it took more than a century to install the first 700 million telephone lines, the next 700 million will be installed in less than 15 years—300 million in China and India alone. In that same period, there will be 700 million new wireless subscribers. It is forecast that there will be 1,000 new communication service providers worldwide within the next two years!

For decades, Silicon Valley was guided by Moore's Law, which states that the capacity of semiconductors will double every 18 to 24 months. But as of September 1999 the numbers suddenly are changing: In the next 18 months, the semiconductor industry is expected to add as much capacity as has been created in the entire history of the chip. It is starting to make the move from producing chips to producing whole systems on a chip.[5]

At least two other technologies are expanding information carrying capacity at least as feverishly: photonics and wireless. Photonics, which employs light to move communications, is doubling the capacity of optical fiber every 12 months. This is dramatically changing the way networks are deployed. Bandwidth (the amount of space available to carry the data and voice traffic that all these networks around us are building up) is also expanding exponentially. Soon, instead of a resource in short supply, bandwidth will be an unlimited one. This change will be analogous to moving from coal to solar energy. In the future, ultrabroad and core networks will enable delivery of communication services in ways so robust and powerful that no one has even dreamed of them yet.

Wireless is another force fueling the communications revolution. While cell phones have gone from a curiosity to become commonplace, the real revolution will come when wireless broadband networks begin to serve as "fiberless" fiber to bring high-speed conductivity to places where it's too expensive or too difficult to lay fiber optic lines. Today, fixed wireless systems can carry information about eight times more quickly than a computer's 56K modem. New technology will boost that capacity by another 10-20 times, opening up wide pipelines to carry voice, data, video and all of the pieces that comprise the growing network of networks. The system for creating, distributing, selling and consuming products is already turning upside down. Advertising, ordering, billing and trading are being swept into networks in an accelerating and ever-widening fashion. Five percent of all global sales will be occurring online as early as 2004.

Add to the telecommunications revolution just described the new world of "'bots," or cyber-robots. In Silicon Valley and elsewhere, more and sophisticated cyber-robots and other cyberagents are being developed. 'Bots with computerized artificial intelligence can be programmed with enormous amounts of information about the goals, preferences, attitudes and capabilities of their "cyber-principals." They can roam in virtual space without human intervention, endowed with such information and apply their artificial intelligence to conduct all manner of commercial, social and intellectual "transactions" with other 'bots and agents, day and night, while their principals are asleep or working on other things. Such robots in turn can appoint sub-agents, capable of speaking in multiple languages or ultimately communicating through a universal "computer-speak."

Attached as Exhibit A to this paper is a downloaded web page showing in "Figure 4" how a group of robots, or "intelligent agents," could act as various personal assistants to an individual or entity trading securities. Thus, in contrast to the largely linear, point-to-point lines between buyers and sellers that have heretofore characterized traditional commerce and early e commerce, securities transactions (as well as other kinds of commerce) will increasingly occur outside of any geographical place, in a truly "virtual world, by highly programmed agents without human intervention. This makes it necessary to consider new, non-geographical or less geographical paradigms. These are discussed in Section IV.

II. Background: Basic Jurisdictional Principles.

While the Internet arguably has created a medium to which traditional principles of jurisdiction may not have full applicability, it is still useful to review briefly principles of jurisdiction that antedate this new medium.

A. Basic Jurisdictional Principles Under International Law.

International law limits a country's authority to exercise jurisdiction in cases that involve interests or activities of non-residents.[6] First, there must exist "jurisdiction to prescribe." If jurisdiction to prescribe exists, "jurisdiction to adjudicate" and, "jurisdiction to enforce" will be examined. The foregoing three types of jurisdiction are often interdependent and based on similar considerations.[7]

"Jurisdiction to prescribe" means that the substantive laws of the forum country are applicable to the particular persons and circumstances.[8] Simply stated, a country has jurisdiction to prescribe law with respect to: (1) conduct that, wholly or in substantial part, takes place within its territory; (2) the status of persons, or interests in things, present within its territory; (3) conduct outside its territory that has or is intended to have substantial effect within its territory; (4) the activities, interests, status, or relations of its nationals outside as well as within its territory; and (5) certain conduct outside its territory by persons who are not its nationals that is directed against the security of the country or against a limited class of other national interests.[9]

Overarching the foregoing international law criteria is a general requirement of reasonableness. Thus, even when one of the foregoing bases of jurisdiction is present, a country may not exercise jurisdiction to prescribe law with respect to a person or activity having connection with another country if the exercise of jurisdiction is unreasonable.[10] The net effect of the reasonableness standard is to require more close contact between a foreign defendant and the forum country than is required under constitutional due process.[11]

B. Basic Jurisdictional Principles Under the U.S. Constitution.

Traditionally, there are two types of personal jurisdiction which state courts may exert in the U.S.: "general" and "specific."

1. General Jurisdiction.

General jurisdiction has been accorded less attention thus far in the cases involving the Internet. Nonetheless, it is an area which can be of great importance as e commerce evolves. General jurisdiction can extend to a nonresident defendant whose contacts with the forum state are unrelated to the particular dispute in issue. The criteria for application of general jurisdiction under constitutional due process limitations are very strict. Such jurisdiction can apply only if the defendant's contacts with the forum are "systematic" and "continuous" enough that the defendant might anticipate defending any type of claim there.[12] Given such strict requirements, it is not surprising that to date there has been no finding of general jurisdiction based solely on advertising on the Internet.[13]

2. Specific Jurisdiction.

Specific jurisdiction of a state applies where the defendant's contacts with the forum state relate to the particular dispute in issues. In 1945, the U.S. Supreme Court held that personal jurisdiction over a non-resident defendant by a forum state requires only that "he have certain minimum contacts with it, such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[14] Existence of the required "minimum contacts" is determined by a three-part test: (1) the defendant must purposefully direct his activities or consummate some transaction with the forum state or a resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum and thereby invokes the benefits and protections of its laws; (2) the claim must be one arising out of or relating to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with "fair play and substantial justice," i.e., it must be reasonable.[15]

A leading example of "purposeful direction" in the context of more traditional media was found where Florida residents wrote and edited an article in the National Enquirer which defamed a California resident. The Enquirer had its largest circulation in California and was the focal point of both the story and the harm suffered. These factors led the U.S. Supreme Court to conclude that there was sufficient evidence that the defendants' actions were "aimed at California" and would be expected to have a potentially devastating effect on the California resident, hence the defendants could have reasonably foreseen being brought into court in California.[16]

The test of "purposefully availing" oneself of the privilege of conducting business in the forum can be met if a party reaches beyond one state to "create continuing relationships and obligations with citizens of another state."[17] For example, taken alone, a single contract between a resident of the forum state and an out of-state party may not establish sufficient minimum contacts to support personal jurisdiction. However, if there are added contacts such as telephone calls and mail into the forum state, the total contacts can collectively form a basis for jurisdiction over the nonresident.[18]

C. Prescriptive Jurisdiction Under Federal Securities Laws of the United States.

U.S. federal securities laws afford only limited guidance on the extent to which their antifraud provisions apply to securities transactions that are primarily extra-territorial but have some connection to the United

States. Courts have struggled for years to delineate the parameters.[19] The Securities Act of 1933 (the "1933 Act") defines its jurisdictional reach to include "any means or instruments . . . of communication in interstate commerce" to sell securities that are not either registered or exempt from registration.[20] Jurisdiction under the Securities Exchange Act of 1934 (the "1934 Act") likewise applies to any broker or dealer (including any foreign broker or dealer), who makes use of any "instrumentality of interstate commerce to effect transactions in, or induce or attempt to induce the purchase or sale" of any security by means of an instrument of communication in interstate commerce.[21] The 1934 Act states that it "shall not apply to any person insofar as he transacts business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules as the [Securities and Exchange] Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter."[22] The 1933 Act, as interpreted by the Securities and Exchange Commission (the "SEC"), does not apply to offers, offers to sell, or sales outside the U.S.[23]

The best known tests for determining the existence of subject matter jurisdiction are the "conduct" test and "effects" test. Under the conduct test, even if the fraud is consummated outside the U.S., federal courts will take jurisdiction over the subject matter when fraudulent conduct (or conduct integrally tied in with fraud) occurs in the U.S.[24] Under the effects test, subject matter would exist when otherwise international securities transactions have a "substantial and foreseeable injurious" effect in a U.S.[25] Under the Restatement (Third) of Foreign Relations Law, the U.S. can regulate conduct outside the U.S. that is significantly related to a securities transaction carried out, or intended to be carried out, on an organized securities market or otherwise predominantly within the U.S., if the conduct has, or is intended to have, a substantial effect in the U.S.[26]

Recently, the Second Circuit Court of Appeals found that neither the 1933 Act nor the 1934 Act could be invoked to cover the sale by a foreign corporation of foreign securities to another foreign entity, even though the sales allegedly were made to the foreign entity's president while he was in Florida.[27] The Second Circuit, applying the "conduct test," found "nearly de minimus U.S. interest" under the 1933 Act in the transactions.[28] As to the broader jurisdiction under the 1934 Act, the court also found insufficient U.S. interest. It held that, without some additional factor, a series of phone calls to a transient foreign national in the U.S. was not enough to make prescriptive jurisdiction reasonable within the meaning of the Restatement (3rd) of Foreign Relations Law Section 416 [jurisdiction to regulate securities activities] and Section 403 [factors to determine whether prescriptive jurisdiction is reasonable]. It found this especially true where another country had a clear and strong interest in redressing the wrong:

"In this case, there is no U.S. party to protect or punish, despite the fact that the most important piece of the alleged fraud—reliance on a misrepresentation—may have taken place in this country. Congress may not be presumed to have prescribed rules governing activity with strong connections to another country, if the exercise of such jurisdiction would be unreasonable in light of the established principles of U.S. and international law. . . . And, the answer to the question of what jurisdiction is reasonable depends in part on the regulated subject matter." (147 F.3d at 130-31)

In contrast, the Seventh Circuit ruled in 1998 that the 1934 Act gave jurisdiction over an alleged fraud of a Malaysian company where the Caribbean-incorporated defendant allegedly conceived and planned its scheme in the U.S., from which solicitations were sent and where payments were received.[29]

D. Prescriptive Jurisdiction Under State Securities Laws in the U.S.

Most of the states within the U.S. have adopted some form of the jurisdictional provisions of the Uniform Securities Act ("USA"). The USA extends a state's jurisdictional reach to persons offering to buy or sell securities "in [a given] . . . state."[30] In fact, the constitutionally permissible adjudicated jurisdiction of states is even broader than the USA's words suggest. Under a typical long-arm statute, even if a defendant does not have substantial or continuous activities within a State, personal jurisdiction can still be based on purposeful direction of activities toward the State.[31] The USA tightens the jurisdictional inquiry by providing that an offer to sell or buy is made "in this state, whether or not either party is then present in this state, when the offer (1) originates from this state or (2) is directed by the offeror to this state and received at the place to which it is directed . . . ."[32]

E. Current Application of U.S. Constitutional Principles to the Internet.

Some precedents involving print, telephone and radio media have been be useful in determining whether jurisdiction over Internet activities offends constitutional due process. For example, if an Internet-based news service were to send a number of messages specifically addressed to residents of a forum, there would be "purposeful direction." Such purposeful direction can exist even though, unlike the physical shipment of substantial numbers of copies of the National Enquirer into California, from which the newspaper may be deemed to foresee an effect in that forum, nothing is shipped physically on the Internet. E mail over the Internet is similar to traditional postal mail and to phone calls in this respect.

Bulletin boards and Web sites are a step removed from e mail. The person who posts a bulletin board message knows that the message can be resent by others elsewhere in the world, but cannot control such redistribution. A Web site is even more of a passive medium; it sends nothing specifically directed to the forum state, but posts general information so that viewers can log on to the site. The better analogy to a Web site might be an advertisement beamed to the world over television. Should there be an analogy to the size of the National Enquirer's forum state circulation drawn from the number of hits on the Web site that emanate from the forum state? A site operator can identify the source of "hits" on his site; an operator of a Web site would therefore know whether a large proportion of the hits came from California. If information about a California resident were posted on the site, it could be argued under the National Enquirer rationale that the operator purposefully directed the information to California residents. However, this would be similar to basing jurisdiction over a telecast on the number of viewers in a given jurisdiction.

We are seeing courts become more selective in the jurisdictional cases, decisions upholding the exercise of specific jurisdiction over a nonresident defendant by reason of using the Internet have largely been based on the defendant's purposeful availment of the privilege of doing business in the forum jurisdiction or the defendant's purposeful direction of electronic communications to the forum jurisdiction.[33] When an Internet communication is directed into the forum for purposes of a transaction, personal jurisdiction based on more traditional means such as mail or telephone can be invoked to determine that the defendant is electing to do business there.

By the same token, if the Web site operator intends to receive communications emanating from the forum state in response to a Web posting and actually does, he avails himself of the privilege of doing business there. In one case, for example, a non-resident of California allegedly operated a scheme consisting of registering exclusive Internet domain names for his own use that contained registered

trademarks.[34] The defendant allegedly demanded fees from a California resident and other businesses that asked him to discontinue his unauthorized use of their trademarks. A federal district court held that it had personal jurisdiction over the defendant by the defendant's having committed a tort "expressly aimed" at California.[35] It reasoned that the defendant could foresee the harm done in California and therefore satisfied the minimum contact requirement.

In an aberrational case that has been little followed by other courts, the defendant registered an Internet domain name which contained the plaintiff's trademark. The plaintiff then sued for violation of his trademark. A Connecticut federal court found the out of-state defendant subject to its jurisdiction mainly because its website could be accessed in Connecticut.[36] It found the advertising to be "solicitation of a sufficient[ly] repetitive nature to satisfy" the requirements of Connecticut's long-arm statute, which confers jurisdiction over foreign corporations on a claim arising out of any business in Connecticut. There was no evidence that any Connecticut subscriber had accessed the site, yet the court held that the minimum contact test of the due process clause of the Fourteenth Amendment was satisfied, because the defendant had purposefully "availed" himself of the privilege of doing business in Connecticut in directing its advertising and phone number to the state, where some 10,000 subscribers could access the Web site.

Constitutional due process allows potential defendants to structure their conduct in a way to avoid the forum state.[37] However, to assume that a Web site operator can entirely avoid a given jurisdiction is unrealistic. Because the Web overflows all boundaries, the only way to avoid any contact whatsoever with a specific jurisdiction would be to stay off the Internet.[38] For that reason, mere accessibility of a Web site should not properly be deemed to satisfy the Fourteenth Amendment minimum contacts requirements. Site operators should be able to structure their site use to avoid a given state's jurisdiction. As described below, this reality has been recognized by regulators in the United States under both state blue-sky statutes and federal securities laws.

III. Current Application of Jurisdictional Principles to Securities on the Internet.

A. The United States.

1. SEC Interpretations.

The SEC has in the past interpreted the 1934 Act broadly enough to require an off-shore broker or dealer to register under that Act where its only U.S. activity is execution of unsolicited orders from persons in the U.S.[39] Such an interpretation is not inconsistent with either concepts of due process or international law. It will be recalled that, under international law, a country may assert jurisdiction over a non-resident where the assertion of jurisdiction would be reasonable.[40] The standards include, among others, whether the non-resident carried on activity in the country only in respect of such activity, or whether the non-resident carried on, outside the country, an activity having a substantial, direct, and foreseeable effect within the country with respect to such activity.[41] Under these rules, a court in one country could assert jurisdiction over a foreign company under the "doing business" or "substantial and foreseeable effects" tests where financial information is directed by e mail into the country. The accessibility of a Web site to residents of a particular country might also be considered sufficient to assert personal jurisdiction over an individual or company running the Web site.

In April, 1998 the SEC issued an interpretive release on the application of federal securities laws to

offshore Internet offers, securities transactions and advertising of investment services.[42] The SEC's release sought to "clarify when the posting of offering or solicitation materials" on Web sites would not be deemed activity taking place in the United States for purposes of federal securities laws.[43] The SEC adopted a rationale that resembles that used by the NASAA in determining the application of state blue-sky laws.[44] Essentially, the SEC stated that it will not view issuers, broker-dealers, exchanges and investment advisers to be subject to registration requirements of the U.S. securities laws if they are not "targeted to the United States.[45]

Thus, the SEC generally will not consider an offshore Internet offer made by a non-U.S. offeror as targeted at the U.S. if (1) the Web site includes a prominent disclaimer making clear that the offer is directed only to countries other than the U.S., and (2) the Web site offeror implements procedures that are "reasonably designed to guard against sales to U.S. persons in the offshore offering."[46] There are several ways that an offer to non-U.S. locales can be expressed. The site could state specifically that the securities are not available to U.S. persons or in the U.S. Alternatively, it could list the countries in which the securities are being offered.

There are likewise several ways to guard against sales to U.S. persons. For example, the offeror could determine the buyer's residence by obtaining the purchaser's mailing address or telephone number (including area code) before sale. If the offshore party received indications that the purchaser is a U.S. resident, such as U.S. taxpayer identification number or payment drawn on a U.S. bank, then the party might on notice that additional steps need to be taken to verify that a U.S. resident is not involved.[47] Offshore offerors who use third-party Web services to post offering materials would be subject to similar precautions, and also would be have to install additional precautions if the third-party Web site generated interest in the offering. The offshore offeror which uses a third-party site that had a significant number of U.S. subscribers or clients would be required to limit access to the materials to those who could demonstrate that they are not U.S. residents.[48]

Where the off-shore offering is made by a U.S. issuer, stricter measures would be required because U.S. residents can more readily obtain access to the offer. Accordingly, the SEC requires a U.S. issuer to implement password procedures by which access to the Internet offer is limited to persons who can obtain a password to the Web site by demonstrating that they are not U.S. citizens.[49]

If Internet offerings are made by a foreign investment company, similar precautions must be taken not to target U.S. persons in order to avoid registration and regulations under the 1940 Act. From a practical standpoint, the SEC's historical reluctance to allow foreign investment companies to register under the 1940 Act means that foreign investment companies can only make private placement in the U.S.[50] When an offer is made offshore on the Internet and with a concurrent private offer in the U.S., the offeror must guard against indirectly using the Internet offer to stimulate participants in the private U.S. offer.[51]

The SEC's interpretation requires a broker-dealer which wants to avoid U.S. jurisdiction to take measures reasonably designed to ensure that it does not effect securities transactions with U.S. persons as a result of Internet activity. For example, the use of disclaimers coupled with actual refusal to deal with any person whom the broker-dealer has reason to believe is a U.S. person will afford an exemption from U.S. broker-dealer registration as suggested in the SEC interpretation, a foreign broker-dealer should require potential customers to provide sufficient information on residency.

By like token, the SEC will not apply exchange registration requirements to a foreign exchange that sponsors its own Web site generally advertising its quotes or allowing orders to be directed through its Web site so long as it takes steps reasonably designed to prevent U.S. persons from directing orders through the site to the exchange. Regardless of what precautions are taken by the issuer, the SEC will view solicitations as being subject to federal securities laws if their content appears to be targeted at U.S. persons. For instance, the SEC cited offshore offers that emphasize the investor's ability to avoid U.S. taxes on the investment.[52]

2. SEC Enforcement Activities.

Notwithstanding federal and state securities laws, investors within the U.S. log on freely to off-shore cyber securities sites, since there are no technological barriers to prevent an American from investing directly via the Internet in the securities of a foreign issuer at a foreign site. For example, U.S. viewers in 1997 could access the site of the first Australian DPO, Linear Energy Corporation Limited (www.linearenergy.com.au), which claimed to have developed an engine using compressed air to generate electricity. Fortunately, a U.S. viewer could not access the offering document without making a misrepresentation, because the Australian Securities Commission required that a viewer first confirm residence in Australia on the screen as a condition of accessing the prospectus.

Not all offshore issuers can be expected to show the restraint of the Australians, which raises the practical question as to how the SEC or state regulations will be able to police offerings to U.S. residents.[53] Despite difficult practical issues facing the SEC in such regulation, it intends to try.[54] The SEC has stated that it might attempt to regulate entities that "provide U.S. investors with the technological capability to trade directly on a foreign market's facilities," which could be construed to embrace any U.S. internet service provider or any U.S. Web site with a link to a foreign stock exchange or bulletin board.[55]

The SEC has made clear its intent to enforce federal statutes with respect to the Internet. For instance, several offshore Internet sites who were not as fastidious as Australia's Linear Energy encountered problems with the SEC. A viewer could in early 1997 click to "FreeMarket" at www.freemarket.org/. The viewer could not have advanced much beyond the home page, which advised that "[a]t the demand of the United States Securities and Exchange Commission, FreeMarket Foundation will discontinue operations immediately." Contending that "FreeMarket was founded upon the central tenet of America that everyone is free to transact business." FreeMarket said that the SEC was "killing" its dream of allowing companies to establish a secondary market for their own shares on the Internet. FreeMarket went off its Web site after February 1997. (By June 1997, the domain name and address had been acquired by WinNET, a web hosting and design firm having no activity in the securities business.)

As late as early June 1997 a Web surfer still might have accessed another foreign Web site, "Offshore Capital Resources" (www.ocr-ltd.bs/). Offshore Capital claimed to be a Bahamian International Business Corporation all of whose operations and all of whose transactions were outside the U.S. It was offering, through what it called an "Offshore Placement Memorandum," shares of its common stock. The SEC also ordered this site to discontinue operations immediately, with the termination notice to be posted until June 30, 1997. Offshore Capital apologized on the screen that "[w]e won't be able to continue with this leading-edge investment concept," because the SEC wanted assurance that U.S. citizens would not participate in the transactions. By late 1997, its Web address was blank.

The SEC has used U.S. federal courts to bring proceedings against foreign-based securities sellers. For example, in 1997 the United States District Court of the District of Columbia permanently enjoined Wye Resources (in a default judgment) from violating U.S. securities laws.[56] Wye, a Canadian corporation, claimed to own mining interests but had no recorded mining earnings. Wye also allegedly issued false press releases and public information. The default nature of the proceeding meant that the jurisdictional issue went uncontested, probably because Wye's former President had earlier consented to a permanent injunction against him in the same action.[57] Similarly, the SEC took the default of a German resident obtained a permanent injunction against her, together with a court order that she pay more than $9.3 million in penalties. She had used the Internet to solicit U.S. investors in building a fraudulent prime bank scheme.[58]

3. U.S. Blue-Sky Administrators.

The Internet from the onset posed an issue whether offerings posted on a Website without more might be subject to the blue-sky law of every jurisdiction from which they were accessible. Certainly, whether an Internet offer "originates" from a given state should not be based on the physical location of the essentially passive circuits carrying the message. Regardless of the multiplicity of networks and computers that an electronic message may traverse, the place where information is entered into a Web site or into e mail is the point of origination. Whether an Internet-based offer to buy or sell is "directed" into a given state is a more complex factual inquiry. If an offer to sell securities were mailed or communicated by telephone to a person in a forum state, personal jurisdiction in that state should apply.[59] By like token, an e mail offer by Internet directly to the a resident of a state would similarly constitute a basis for jurisdiction in that state. So would acceptance by an out of-state issuer of an e mail from person in the forum state, subscribing to a general offering posted on the World Wide Web.

However, mere posting of the existence of an offering on the World Wide Web, without more, is different. Standing alone, it constitutes insufficient evidence that the offer is specifically "directed" to persons in every state. The offer may, indeed, not be intended to be accepted by persons in certain states. In order to reconcile technology, practicality and due process, the North American Securities Administrators Association (NASAA) became the first super-regulatory entity to adopt a jurisdictional policy that would facilitate electronic commerce in securities. The NASAA adopted a model rule, under which states will generally not attempt to assert jurisdiction over an offering if the Web site contains a disclaimer essentially stating that no offers or sales are being made to any resident of that state, the site excludes such residents from access to the purchasing screens and in fact no sales are made to residents of that state.[60]

As of early 1999, 34 states had adopted a version of the NASAA safe-harbor, either by statute, regulation, interpretation or no action letter.[61] Commonly, the disclaimer is contained in a page linked to the home page of the offering. A preferred technique is to request entry of the viewer's address and ZIP code before the viewer is allowed to access the offering materials. If the viewer resides in a state in which the offering has not been qualified, access is denied. Of course, the viewer might choose to lie, but it can be argued with some logic that a Website operator cannot reasonably "foresee" that viewers would lie.

NASAA also adopted in 1997 a practical approach to jurisdiction over Internet-based broker-dealers and investment advisors.[62] NASAA's policy exempts from the definition of "transacting business" within a state for purposes of Sections 201(a) and 201(c) of the Uniform Securities Act those communications

by out of-state broker-dealers, investment advisers, agents and representatives that involve generalized information about products and services where it is clearly stated that the person may only transact business in the state if first registered or otherwise exempted, where the person does not attempt to effect transactions in securities or render personalized investment advice, uses "firewalls" against directed communications, and also uses specified legends.[63] NASAA's approach should facilitate the use of the Web by those smaller or regional securities professionals who focus their activities in a limited geographical area.

B. Other Countries.

1. Introduction.

Regulators outside the U.S. are also sorting out jurisdictional challenges raised by the Internet. For example, Joanna Benjamin, deputy chief executive of the U.K.'s Financial Law Panel, sees the traditional, geography-based system of jurisdiction undermined by global networks and remote access. At the same time, she sees the International Organization of Security Commissions, the U.S., U.K. and Australia all moving toward a regulatory environment in which the "effects" principle of jurisdiction is given greater emphasis.[64] According to Christopher Cruickshank of the European Commission, his agency hopes to clarify the regulatory issues facing the European securities industry by promulgating a directive that will help define where an electronic organization is based and what contract laws apply to U.S. business.[65] In any event, the following brief survey confirms that the "effects" approach to Internet jurisdiction is receiving substantial attention from regulators around the world.

2. United Kingdom.

In the U.K., solicitations that may be characterized as "investment advertisements" under Section 57(1) of the Financial Services Act may not be issued unless the regulatory authorities have previously approved its contents. A key jurisdictional issue is whether online offering materials accessible in the U.K. have been "directed at" or "made available" in the U.K. for purposes of Section 207(3) of the Financial Services Act. The U.K. securities regulators, including the Securities and Futures Authority ("SFA"), and the Investment Management Regulatory Organization Ltd. ("IMRO") have issued guidelines dealing with this question.[66]

SFA guidelines issued in May, 1998 provide that any material which is an "investment advertisement" disseminated over the Internet will be deemed to "have been issued in" the U.K. if it is "directed at people in" the U.K. or "made available" to them other than by way of a periodical publication published and circulating primarily outside the U.K.[67] These standards bear a similarity to the standards used by the SEC, which also stress the "effects" test.

The SFA's enforcement policy takes into account its mandate to protect domestic investors, the extent to which U.K. investors are targeted, and the effectiveness of a firm's system for ensuring that only persons who may lawfully receive investment services do so. The SEC, the SFA will base its enforcement decisions regarding Internet investment solicitation on a totality of the particularized circumstances, including, for example, whether other violations have occurred, such as fraud. The SFA's states that it would consider the following factors particularly relevant when evaluating whether enforcement action is warranted:

(a) whether the website is located on a server outside the U.K. (note that the SFA would not deem

the existence of a web site on a U.K. server to be conclusive evidence that material on that site was aimed at the United Kingdom);

(b) the degree to which the underlying investment or investment service to which the website posting refers is available to U.K. persons who respond to the solicitation;

(c) the extent to which the offerors have undertaken to ensure that U.K. persons do not receive the investment or service as a result of having viewed the solicitation, such as specific measures to prevent U.K. persons from opening an account to purchase or to request further information regarding investment services on the site;

(d) the extent to which any solicitation is directed at U.K. investors; and

(e) the extent to which positive steps have been taken to limit access to the site (though the absence of access controls on a site will not, of itself, trigger enforcement action).

Many of these criteria are similar to those adopted by the SEC.

With regard to defining the phrase "directed at persons in the U.K." (see (d) above), the SFA would take into account factors relating to the content of the site, such as:

(a) disclaimers and warnings on the home page(s), where investment services could be ordered or purchased (e.g. an application form);

(b) hyperlinks to the disclaimer or warnings on other pages, which state either (i) that the investment services are, or are only available in certain jurisdictions (and if so, listing the jurisdictions), or (ii) that the services are not available in those jurisdictions where the firm is not authorized or permitted by local law to promote or sell the product (stating where the services were or were not available legally);

(c) whether the disclaimers could be viewed in the same browsers format as the rest of the site;

(d) whether the content on the site was written to make it clear that the site is not aimed at U.K. investors, e.g., not including financial projections in pounds sterling;

(e) whether the existence of the site has been reported to U.K. search engines or the "UK Section" of a search engine by those responsible for the site;

(f) whether any e mail, newsgroup, bulletin board or chat room facility associated with the site has been used to promote the investment in the U.K.; and

(g) whether there has been any advertising of the site through any medium in the United Kingdom.

3. Canada.

(a) Background.

(i) Federal and Provincial Dichotomy.

Canada is a federal state governed and administered pursuant to a Constitution that specifies a division of powers between the national and provincial governments. The Parliament of Canada has prescriptive jurisdiction over most areas of legal concern in electronic commerce ("e commerce"), including tax,

intellectual property, banking, and privacy. Securities and gaming, however, are regulated provincially. Provinces also have jurisdiction over provincially incorporated companies, which comprise the majority of incorporations in Canada.

Whether the Internet and e commerce in general are matters of federal or provincial jurisdiction has not been conclusively decided. Statutory interpretation and government practice, however, suggest that both likely fall under federal jurisdiction.

The federal Parliament has exclusive jurisdiction over interprovincial works and undertakings related to transportation or communication. This has provided an interpretive basis for the extension of federal jurisdiction over telecommunications and television and radio broadcasting. The nature of the Internet as an interprovincial and international communications system posits a strong argument in favor of federal jurisdiction over related works and undertakings—notwithstanding the possibility that Internet telephony and Web broadcasting, for example, may also fall under traditional federal regulatory scrutiny. Federal Jurisdiction could in theory extend to matters relating to the management and operation of Internet works and undertakings, or to Internet content.[68] A conclusive legal determination of federal jurisdiction over the Internet or e commerce would substantially limit the scope of provincial governments to legislate in these areas.[69]

(ii) Federal Intent to Promote E Commerce.

Federal initiatives thus far indicate that the Canadian government is interested in promoting rather than regulating electronic commerce and the Internet. Thus, initiatives directed at the development and regulation of the Internet in Canada have proceeded without a formal jurisdictional determination, and have primarily been federal. In September 1998, Industry Canada launched a national electronic commerce strategy[70] that identified jurisdiction as an issue to be addressed in business-to-business and business to-consumer e commerce relationships. Also in fall 1998, the Canadian Radio-Television and Telecommunications Commission (CRTC) conducted public hearings on 'new media' with a view to exploring the obligations that the Internet and other new technologies may place on the regulator under the Broadcasting Act (1991) and Telecommunications Act (1993).[71]

(b) Basic Principles of Jurisdiction in Canada.

Although principles of personal jurisdiction in Canada are broadly similar to those found in the United States, there are some important differences. In Ontario, for example, an originating process may be served on an extraterritorial defendant, without leave, where a breach of contract or tort has been "committed in Ontario" or where damages have been "sustained in Ontario," among other enumerated categories.[72] Ontario, as other provinces, also permits its courts to assume jurisdiction on matters not named in the statute, where a connection exists between the action and the forum.

The breadth of this discretion is constrained by two doctrinal thresholds, one positive and one negative. The positive threshold requires that there be a "real and substantial connection" between the cause of action and the Jurisdiction. The negative threshold requires that the jurisdiction in question not be forum non conveniens, and functions as a test of the appropriateness of one jurisdiction over other possible jurisdictions. It is probable, although somewhat unclear, that these thresholds are more demanding than the statutory criteria outlined above. The statutory criteria for service may also be seen as expositive of the "real and substantial connection" requirement.[73]

(i) "Real and Substantial Connection."

The "real and substantial connection" requirement is based on the long-established Canadian legal principle of order and fairness and plays a role similar to the "minimum contacts" test in United States law.[74] The leading Supreme Court of Canada case on the doctrine[75] was interpreted by the Supreme Court in a later case not to be "a rigid test" but rather one "intended to capture the idea that there must be some limits on the claims to jurisdiction."[76] The Court remarked on the need for "greater comity . . . in our modem era when international transactions involve a constant flow of products, wealth and people across the globe," and further prescribed that "jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections."[77]

Application of these general principles to contract, criminal/civil and tort contexts reveals important implications for jurisdiction in cyberspace. Even prior to the foregoing cases, Canadian courts began moving away from a strictly territorial approach to jurisdiction in contracts, criminal, and civil cases, acknowledging that some aspects of the connection are geography-neutral.[78] This predicts considerable continuity between the established approaches to determining jurisdiction and future cases on Internet Jurisdiction. In contrast, Canadian tort law is based on a strict lex loci delicti (i.e., the place where the tortious activity occurred) rule, articulated most recently by the Supreme Court of Canada in Tolofson.[79] This diverges from the 'most significant relationship' test in United States law, which is less exclusively based on a territorial locus and conflicts with the increased flexibility of the jurisdictional test discussed above. The court in Tolofson does qualify its conclusions with respect to "a wrong [that] directly arises out of transnational or interprovincial activity," where it notes that "other considerations may play a determining role."[80] A rigid interpretation of Tolofson, however, could lead to difficulties in Internet defamation or 'cyber libel' cases, or even, in the context of e commerce, in some negligent misrepresentation cases. This lies in the fact that the lex loci delicti rule at Canadian law could be construed to render a tort actionable per se in every Jurisdiction in which it has been read, heard or perceived.[81] Although a recent Canadian case concerning jurisdiction for Internet libel did not manifest this problem, it may surface in the future.[82]

In the application of the "real and substantial connection" test generally to Internet jurisdiction, two recent and relevant cases offer substantial clarification. In Craig Broadcast Systems,[83] the Manitoba Court of Queen's Bench commented obiter on the difficulty of determining whether an action had a "real and substantial connection" with the forum in cyberspace and suggested that "the 'issue will not be resolved by one or two factors, but by looking at the accumulation of factors in the particular case."[84] More recently, the British Columbia Court of Appeal bore out this approach when it upheld North Carolina Jurisdiction following a breach of a sale of goods contract by a Canadian company.[85] The court noted, inter alia, that the defendant company had "portrayed itself as a corporate citizen that operated internationally . . . by virtue of its Internet advertisements."[86] The court also noted that the purchase had been made, the equipment installed, and the losses suffered in North Carolina.

(ii) Forum non conveniens.

Notwithstanding the "real and substantial connection" test, Canadian courts may surrender jurisdiction on the basis of forum non conveniens if they determined that another jurisdiction would be more appropriate to hear a case.[87] Although the forum non conveniens doctrine is recognized in all Canadian jurisdictions, few interpretive rules are prescribed by statute or at law. Factors Canadian courts

have traditionally considered include: the physical location of the parties, witnesses, or evidence; the coordination of legal systems; the justice of the end result; the protection of justified expectations; the predictability and uniformity of results or of legal consequences; and the convenience, simplicity, ease in the determination, and application of the law to be applied.[88] The Canadian test usually involves a balancing of interests rather than the procedural guarantee provided by the due process requirements of the 14th Amendment. In some cases, this may result in less protection for an extraterritorial defendant in Canadian than in American courts.[89]

Two recent cases involving Internet jurisdiction suggest how Canadian courts may decide forum non conveniens in future e commerce cases. In Kitakufe,[90] an Ontario court ruled against a forum non conveniens motion to transfer a proceeding to Uganda. The plaintiff, an Ontario physician, alleged libel against another Ontario resident who wrote for a newspaper published in Uganda and reproduced on the Internet. Although the court primarily relied on traditional forum non conveniens analysis, the Internet republication supported the court's central conclusion that the alleged damages were primarily suffered in Ontario.

In Alteen,[91] the Newfoundland Supreme Court upheld a determination that Newfoundland was the appropriate forum to hear an action for misrepresentation brought by Newfoundland investors against a California company, Informix, in which the investors had purchased shares. The court rejected the traditional forum *non conveniens* arguments advanced by Informix[92] and instead relied substantially on the fact that investment information issued in the United States could have reached Canadian investors and the Canadian business press through the Internet, creating the foreseeability of Canadian shareholders.

(iii) Enforcement of Judgments.

Like the United States, Australia and other federal states, Canada has arranged for the reciprocal enforcement of judgments given by provincial courts within its borders. Assuming a foreign court has exercised jurisdiction legitimately, Canada normally follows the principle of comity and voluntarily submits to the jurisdiction of friendly nations and enforces foreign judgments in exchange for the promise of similar treatment.

Often Canadian courts will require that other conditions be fulfilled. In the only Canadian internet jurisdiction case so far relating to enforcement,[93] the British Columbia Court of Appeal overturned the summary decision of another British Columbia court enforcing the default judgment of a Texas court on an action for libel. Both the appellant and the respondent were domiciled in British Columbia, but the respondent had filed in Texas on the basis that alleged defamatory statements posted on an Internet discussion group affected its interests vis a-vis existing and potential investors in Texas. The British Columbia Court of Appeal disagreed, finding no "real and substantial connection" in the "mere transitory, passive presence in cyberspace of the alleged defamatory material," and the "mere possibility that someone . . . might have reached out to cyberspace to bring the defamatory material to a screen in Texas."[94] In effectively "second-guessing" the Texas court, the British Columbia Court was echoing the same rule that generally applies in the U.S., namely, a passive Website accessible in the forum is not enough to confer jurisdiction on the forum.

Given the ease with which less cooperative nations (the so-called 'Internet paradises') can be used as e commerce domiciles, the enforceability of Canadian and foreign judgments is likely be a key issue in

future Canadian jurisprudence on e commerce.

The Canadian government has demonstrated a strong commitment to the promotion of electronic commerce, including through the removal or resolution of legal barriers. A federal Task Force on Electronic Commerce was struck in 1998 to coordinate developments in particular industry areas.[95] The June 1998 conference of federal, provincial and territorial ministers responsible for the information highway agreed to promote and support the removal of legal, policy or regulatory obstacles to electronic commerce.[96] By the end of 1998, Canada was one of the first countries to have set out a comprehensive electronic commerce agenda addressing policy development in most key areas of legal concern. Specific policy and jurisprudential developments are discussed below.

(c) Application of Jurisdictional Principles to Cyberspace Securities.

Cyberspace jurisdiction in Canada raises special problems in securities law. Unlike the United States, Canada has no body of case law (beyond general jurisdictional principles), dealing expressly with its extraterritorial reach. Further, securities law in Canada is a provincial, rather than federal matter. Jurisdiction in Canada over securities matters is divided among the provincial and territorial governments; there is no uniform national securities law. Thus, long-standing jurisdictional challenges, such as the enforcement of registration requirements, may be expected to multiply in proportion to the growth of e commerce.[97] The Internet also raises unique questions, such as when one must advert to the requirements of other jurisdictions. In 1997, the Ontario Securities Commission (OSC shut down a web site that provided detailed stock advice.[98] The site was provided free of charge, and apparently run as a hobby by a Canadian investor who was unaware of the registration requirement. It is doubtful that the OSC could have enforced the regulation against a site operated from outside Canada by a Canadian, much less by a foreign national. This points to the need for a major review of securities regulations.

The British Columbia Securities Commission has indicated that it would follow a jurisdictional policy similar to that of NAASA and the SEC. Applying a two-fold test, it will deem that its securities laws apply when either the person making a communication or the person to whom a communication is directed is located in British Columbia. Where the communication is simply posted and not directed (e.g., by e mail) into the province, British Columbia regulation can be avoided by a disclaimer at the outset that either expressly excludes British Columbia or directs the communication exclusively to other specified jurisdictions.[99]

In June, 1997, the Canadian Securities Administrators (“CSA”), which roughly parallels NAAS, promulgated a request for comment on the concept of issuers delivering documents using electronic media.[100] The Canadian proposal attached SEC Release 33-7233 as an example of an approach to regulatory issues involved in electronic vs. paper delivery, but did not address jurisdictional questions. In December 1998 the CSA published for comment two national policies that represent an attempt to clarify the application of securities law principles in the context of the Internet and other electronic means to transmit information. National Policy 11-201 relates to the ability of issuers and registrants to deliver documents electronically, while National Policy 47-201 relates to the use of the Internet to facilitate distributions of securities. As policies of the CSA rather than rules, they do not have the force of law. Nonetheless, they are useful indicators of how Canadian securities laws may be applied.

National Policy 11-201 addresses the issue of whether deliveries of documents required to be made under

securities legislation may be made by electronic means, such as by electronic mail or through posting on a Web site. This Policy would apply to deliveries by issuers or registrants of such documents as prospectuses, financial statements, trade confirmations and account statements. It would not apply to deliveries where the method of delivery is specified by securities legislation, e.g., take-over circulars. Deliverers of documents would also have to regard any applicable requirements of specific corporate legislation imposing specific delivery requirements.

Policy 11 201 would require four components of electronic delivery to be satisfied in order for an electronic delivery to be considered effective under securities legislation, namely:

(i) the recipient of the document must receive notice that the document is about to be sent, or that it is now available;

(ii) the recipient of the documents must have easy access to the document;

(iii) the deliverer of the document must have evidence that the document has bee delivered or otherwise made available to the recipient; and

(iv) the document cannot be altered or corrupted in the transmission process.

The first three criteria are quite similar to the SEC's criteria discussed earlier. Perhaps the most important recommendation is that deliverers of electronic information obtain the consent to electronic delivery from each proposed recipient. The consent is proposed to be used as a mechanism by which the deliverer of the documents can describe the proposed methods of delivery, the technical requirements for receipt of the documents and any other material aspects of the delivery, and obtain agreement to that approach from the proposed recipient. Once a recipient's consent is obtained, a deliverer that delivers documents electronically in accordance with the terms of the consent is entitled to infer that the first three conditions described above are satisfied. The Policy 11 201 notes that deliverers may send documents electronically without obtaining the consent of recipients but do so at the risk of bearing a more difficult evidentiary burden of proving that the conditions described above were satisfied on the delivery.

National Policy 47-201 states the views of the CSA on a number of issues relating to the use of the Internet and other electronic means in connection with trades and distributions of securities. The Policy primarily deals with two matters: jurisdictional issues, and the transmission of roadshows over the Internet. CSA in effect viewed the jurisdictional issue much like NAASA. The Policy in effect provides that, prima facie, a party who posts an offering document on a Web that is available in a Canadian jurisdiction is considered to be trading in the jurisdiction. However, the CSA will take the view that the posting does not constitute trading in the jurisdiction if the document prominently describes the locations in which the relevant securities are being offered, and if steps are taken to ensure that no securities are sold within the jurisdiction.

The CSA also addressed the issue of transmission of roadshows over the Internet. In the Policy, the CSA indicate its approval in principle to these transmissions, but generally attempted to ensure that transmission of roadshows will be done in accordance with the same principles that apply to roadshows now. The Policy provides that everyone receiving a transmission must have received a preliminary prospectus, that access to a transmission should be controlled and that everyone receiving a transmission should agree not to retransmit or reproduce the transmission. (The comment period on the Policies expired on February 17, 1999.) In October 1998 the CSA issued an information bulletin warning

investors of the potential on the Internet for fraud, unregistered trading, misrepresentations, manipulation, illegal distributions, and conflicts of interest.[101] The CSA also recently struck a committee to address the regulatory issues arising out of the use of the Internet and other electronic media by market participants. The goals of the committee are to foster development and innovation without compromising investor protection or investor confidence.[102] Regulators will likely have to make extensive changes to rules developed for a physically delimited environment.

On the other hand, some solutions may be straightforward. The British Columbia Securities Commission has indicated that a clear warning about jurisdictions from which an enterprise will or will not accept customers would be sufficient to suspend the registration and prospectus requirements of British Columbia securities law.[103] Absent such a disclaimer, however, Canadian courts have shown a willingness to subject foreign defendants to Canadian jurisdiction. In Alteen,[104] the court allowed an action against an American company to proceed in Newfoundland even though the company had issued no public statements in Canada, made no direct solicitation in Newfoundland, and had no contact with investors in the province. This case should be contrasted with Braintech,[105] in which the British Columbia Supreme Court found that merely passive dissemination of information to individuals in another jurisdiction was *insufficient* to ground jurisdiction for a tort action.

Jurisdiction issues arising from the sale of goods over the Internet occur generally in the electronic ordering of tangible goods, as well as the online delivery of intangible goods such as downloadable software, music, video, text or images. Tangible goods sales also present problems when the goods carry geographically-based licensing or registration requirements, which are prevalent in Canada. In Ontario, for example, licensing or registration requirements apply generally to extra-provincial corporations and limited partnership, and specifically to sellers of liquor, books/periodicals, gaming products, agricultural goods, cattle & livestock, farm implements, grain, motor vehicles, tickets to sporting events, and direct sales goods.

The Personal Information Protection and Electronic Documents Act introduced in October 1998 included provisions on the admissibility of electronic evidence such as contracts, invoices, and receipts—all common sources of dispute in the sale of goods—as well as on the certification of electronic signatures.[106]

The only Canadian jurisprudence on cyberspace jurisdiction involving the sale of goods is the British Columbia Court of Appeal's decision in Old North State Brewing, in which a Canadian brewing equipment supplier was compelled to defend an action for breach of contract in the jurisdiction of the purchaser.[107] The case is consistent with traditional doctrines that support a finding of Jurisdiction in the place at which a contract has been agreed, executed, and damages from a breach of contract suffered.

4. The Netherlands.

To date neither the STE nor the Dutch Central Bank has published policy statements with respect to these issues. However, STE advised in 1998 that it has together with representatives of DNB formed a policy committee and which will issue guidelines with respect to the offering of securities via Internet in the near future. STE further advised that it is likely to take the position that an offering of securities via Internet is deemed to take place from The Netherlands if:

a. the issuer, trader or broker has its registered office in The Netherlands; or

b. the offer is specifically directed to potential investors in The Netherlands.

They propose to establish the fact that an offer is "specifically directed to Dutch investors" can be derived from several underlying facts, such as the information on the web site being in the Dutch language; the web site containing information which is relevant for potential Dutch investors, such as a description of the Dutch tax situation; an e mail being sent to potential Dutch investors, or the existence of a web site of an issuer, trader or broker containing information with respect to securities (and through which web site in fact securities are offered specifically to potential Dutch investors), is advertised in The Netherlands "by other physical means" (i.e., by bill boards, posters, or media).

The STE actively monitors Internet offerings of securities. Thus far, no information is available of sanctions imposed against violations of the laws.

5. Belgium.

As in the Netherlands, there is no specific regulation in Belgium regarding the trading of securities via the Internet. It is therefore generally held that the existing regulations on public offerings apply trading on the Internet,

When a public offering is made in Belgium, the issuer has to provide investors with a prospectus, which must first be approved by the Banking and Financial Commission ("BCF," "Commissie voor Bank- en Financiewezen," "Commission Bancaire et Financière"), the Belgian regulatory authority. The BFC authorizes the circulation of a prospectus via the Internet by an authorized intermediary, as long as the web site displaying the prospectus contains a special note, warning that (i) the BCF has first approved the prospectus and that (ii) foreign legislation may still be applicable.

The issues are whether the offering on the Internet is public or not, and whether it is deemed to be made in Belgium or not. Firstly, an offering is deemed to be public (i) when it is advertised through a communication which is directed to the public in Belgium, (ii) when it is made through an intermediary in Belgium, or (iii) when it is addressed to more than 50 persons in Belgium. There is, like in Dutch law, an exemption when the offering is only designated to institutional investors.

On the second issue (whether the offering through the Internet is deemed to be made in Belgium), there are, as yet, no clear rules in Belgium. In principle, a public offering shall be deemed to be made in Belgium when a person residing in Belgium is solicited, regardless of the nationality of the parties and the place where the orders are taken. This criteria is, however, too broad when applied to the Internet and will have to be further defined by reference to case law in other fields, like case law issued in respect of commercial advertisement in Belgium.

6. Germany.

In Germany, there are at least two laws aimed at protecting potential investors in securities. The Foreign Investment Act and the Securities Selling Prospectus Act. Both acts apply if a "public offering" is made in Germany. If an offer of securities is actually being made in Germany, notification of the offer and a prospectus for the offer itself, is required.

As in most other countries, Germany has some exemptions, two of which are the "professional investors exemption" and the exemption for the holders of a European Passport. These correspond to exemptions also available under Dutch law.

It is unclear whether a public offering is deemed to be made in Germany if a web site is available or entered in Germany. It is generally held, that an offering is, inter alia, considered to be made in Germany if (i) the web site is in the German language; or (ii) the contents of a web page are printed out and sent to potential German investors; or (iii) an advertisement is made in the media which includes a reference to the Web site. It is further held that a prospectus which is only available on a web site and is not printed does not meet the requirements of German law. Also the issuer, trader or broker is not allowed to take orders from German investors until they have received a written prospectus. As is the case in The Netherlands, an offer made by e mail is considered to be a public offering, unless the e mail was only sent to a limited number of potential investors, who were known to the issuer, trader or broker.

In a notable case, the German government sought to enforce its laws against distribution of pornographic material, by ordering CompuServe to disable access by German residents to certain global Usenet newsgroups.[108] Anyone inside Germany with an Internet connection could easily find a way to access the prohibited news groups during the ban, for instance by linking up through another country. Although initially compliant, CompuServe subsequently rescinded the ban on most of the files by sending parents a new program to chose for themselves what items to restrict.[109]

7. Hong Kong.

(a) Background: Structure of Regulation.

The financial services industry is important to Hong Kong's economy. In addition, Hong Kong's financial market acts as a major financial center in the region, particularly with its recent reversion to China. There are three major sources of securities regulation in Hong Kong: The Securities and Futures Commission of Hong Kong ("SFC"), The Stock Exchange of Hong Kong ("SEHK") and the Hong Kong Futures Exchange ("HKFE").[110]

The SFC is the primary Hong Kong securities regulator.[111] It supervises the self-regulatory market bodies, including the SEHK and the HKFE, securities clearing houses, as well as financial intermediaries other than members of the exchanges. The SFC Ordinance, together with the Securities Ordinance and the Stock Exchanges Unification Ordinance, provide the fundamental framework within which dealings in securities are conducted and regulated. Apart from these and other statutory instruments, the operation of the securities market is also governed by the regulations, administrative procedures and guidelines developed by the SFC, as well as by the rules and regulations introduced and administered by the exchanges. The two exchanges have the front-line responsibility for maintaining the integrity, efficiency and fairness of their markets, as well as for ensuring the financial soundness and correct business conduct of their members.

The SFC's function is to administer the laws relating to the trading of securities, futures and leveraged foreign exchange contracts in Hong Kong. These laws are designed to ensure that the financial community operates with integrity so that the interests of investors are protected. The SFC also is charged with facilitating and encouraging the development of Hong Kong's markets. The SFC has oversight responsibility for the exchanges and their clearing houses, which in turn are the front-line regulators for their own members. The SFC has front-line regulatory responsibility for takeovers and mergers activity, regulation of offers of investment products, financial intermediaries other than exchange members and the enforcement of laws regarding market malpractice. Hong Kong's regulatory system also places great emphasis on the cooperation and participation of market practitioners in the

regulatory process.

On March 31, 1999, the SFC issued a Guidance Note on Internet Regulation that clarifies its regulatory approach regarding Internet activities.[112] These activities include securities dealing, commodity futures trading, foreign exchange trading, and related advisory businesses; the issuing of advertisements or other documents relating to securities, investment arrangements and investment advisory services; and the making of offers of securities and investment arrangements by way of an electronic prospectus.[113] The Guidance Note states that SFC will continue to revise and update its regulatory approach as technology develops. The SFC also expects registered persons to provide additional operational measures if they intend to conduct on-line securities dealing, commodity futures trading and leverage foreign exchange trading activities. In addition, the SFC may update this Guidance Note due to the proposed Securities and Futures Bill.

The SFC believes that its fundamental regulatory principles are not based on the use of a particular medium of communication or delivery. Rather, regulated activities should be uniformly regulated regardless of whether such activities are conducted by paper-based or electronic media. Recognizing the Internet's potential, the SFC encourages its legitimate use and the development of new mechanisms to facilitate offering and trading activities. The Guidance Note does not have the force of law and does not override the provisions of other laws.

(b) Jurisdictional Approach.

Generally, the SFC does not regulate secondary trading conducted from outside Hong Kong, including on the Internet. There is an exception for activities detrimental to Hong Kong investors' interests. Regardless of the medium of communication or delivery, the SFC registration and licensing requirements apply to all businesses which deal, trade and provide advisory services in Hong Kong. The same applies to persons who induce Hong Kong residents to deal in securities, trade in commodity futures contracts or engage in leveraged foreign exchange trading or holds themselves out as conducting such business activity in Hong Kong.

The Guidance Note imposes registration requirements on persons who provide on-line advisory services regarding securities or futures contracts to Hong Kong residents or conduct business activity in Hong Kong. To determine whether a person conducts these activities in Hong Kong, a facts and circumstances analysis must be made. Relevant facts and circumstances may include (i) the actual physical location or presence of the business, (ii) the manner of the activities that have been carried out in Hong Kong, (iii) the nature of such activities, and (iv) the motives for conducting of the activities.

The Guidance Note applies to persons employed or acting for a dealer, trader or adviser who uses the Internet to perform any of the functions of a dealer or adviser for compensation. The SFC expects these persons to have a valid business registration or registered office in Hong Kong. This serves to ensure that there is a contact between the registered or licensed person, investors and regulators. An e mail address is not acceptable for this purpose.

Companies or other market participants may not issue advertisements or documents that invite investors to buy or sell securities or participate in investment arrangements unless they are approved by the SFC or exempt. This restriction applies regardless of the medium used to communicate or deliver the advertisements or documents. The SFC, however, generally will not apply these requirements to activities if they are not targeted to Hong Kong residents.

Unless exempt, persons may not issue advertisements or documents purporting to give investment advice or manage investors' portfolios for remuneration. If the advertisement or document is sent over the Internet and is targeted at Hong Kong residents, it may trigger registration requirements.

To determine whether an activity conducted on the Internet is targeted at Hong Kong residents, the SFC will consider the nature of the business activities as a whole and the following factors:

· Whether the information is targeted via "push" technology to investors whom the financial services provider knows, or should reasonably know, reside in Hong Kong.[114]

· Whether the information available over the Internet is presented or provided in a manner which gives the appearance that Hong Kong residents are targeted. The SFC may consider the following factors as giving the appearance that Hong Kong residents are targeted: using local distribution agents; referring to Hong Kong dollars; using Chinese language; using hyperlinks to the web site of a distributor who possesses the above characteristics; or publishing the web site address in a Hong Kong newspaper or other Hong Kong publication where such information may be accessed.

The SFC may, taking into account the activities of the business as a whole, regarding activities conducted over the Internet as not targeted at Hong Kong residents if-

· The information includes a prominent disclaimer indicating that the services or products are not available to Hong Kong residents. The disclaimer should be viewed with or before the advertisement or description of the services or products. This may be achieved by either an affirmative statement stating the countries where the services or products are made available or stating that the services or products are not available to Hong Kong residents. A statement that the service or product is not available in any jurisdiction in which it would or could be illegal does not satisfy this requirement.

· Reasonable precautions are taken to guard against the acceptance of purchases from or provision of services to Hong Kong residents. Precautions may include the checking telephone numbers and mailing addresses (including e mail addresses) of potential clients; the use of firewall, password, blocking or other limiting device to restrict access to the information and services provided; or not providing the means for applying for the services. Precautions that simply require persons to identify whether they are Hong Kong residents alone are not sufficient. However, the use of precautions or disclaimers will not necessarily preclude the SFC from taking enforcement action.

Generally, an offer of securities or investment arrangements using a prospectus cannot be made until certain requirements have been met. The SFC considers that these requirements apply regardless of the medium used to distribute the prospectus. So, the SFC generally would permit the distribution of electronic prospectuses provided that the relevant requirements have been duly met.[115]

The SFC believes that paper-based information remains the primary means by which many investors assess complex disclosure information. Therefore, paper-based information cannot be eliminated at this time. If electronic prospectuses are distributed, the SFC expects that paper copies of the prospectus will be made available to investors. The SFC also expects issuers to state prominently in the electronic prospectus that a paper prospectus is also available and the location where copies of the paper prospectus can be obtained (which must be a location convenient for collection of such documents).

The SFC continues to require that application forms and prospectuses submitted to the SFC for

authorization be submitted in paper. This is consistent with the current requirement for submitting paper prospectuses to the Companies Registry for registration. An application form for securities can only be issued when accompanied with a prospectus which complies with the relevant requirements. Issuers should ensure that if investors are able to receive an electronic application form, such application form is accompanied by an electronic prospectus.

Issuers should ensure that an electronic prospectus (and any related application form) is identical to the corresponding paper prospectus (and application form) that has been authorized or registered. It is the responsibility of issuers to take appropriate measures to ensure that the electronic version of the prospectus and application form received by investors have not been altered. An issuer should not accept an application if it has reason to believe that an investor has or may have received an incomplete or altered electronic prospectus.

Electronic prospectuses should be presented to investors in a way that encourages investors to make decisions on the basis of the prospectus contents, not on the basis of promotional or aggressive marketing material. Issuers who have issued prospectuses in both paper and electronic form should ensure that any supplemental prospectuses or subsequent amendments to the prospectus are also made available in both paper and electronic form.

For subscription of shares or debentures, the SFC believes that issuers should accept only paper application forms. Investors should be told that shares or debentures can only be subscribed for by completing a paper application form or a hard copy of the electronic application form. For collective investment vehicles, the SFC believes that intermediary or mutual fund managers should only accept electronic applications from investors who already maintain an account with them. Intermediaries or fund managers who use the Internet should ensure that proper account opening procedures have been followed to establish the investor's identity, financial situation, investment experience and investment objectives. They should also ensure that their computer systems have sufficient operational integrity, including security and reliability.

Registered persons and financial services providers should disclose the risks associated with Internet transactions. The SFC expects registered persons and financial services providers to disseminate a prominent warning on its web sites that alert investors of the risks prior to accessing their services. The warning should disclose that transactions over the Internet may be subject to incorrect data transmission, interruption, transmission blackout or delay.

(c) Enforcement Issues.

Regardless of the communication or delivery medium, the SFC will continue to apply the general anti-fraud and anti-manipulation provisions in its enforcement actions. If any person responsible for activities over the Internet is found to have acted in contravention of the provisions or appears to have been involved in any misconduct whether in Hong Kong or elsewhere, the SFC may exercise its regulatory powers (including prosecution or taking other disciplinary actions as may be required). When necessary, the SFC may consider other regulatory means available to it including seeking cooperation from foreign regulators and law enforcement agencies to take joint enforcement action.

8. Australia.

On February __, 1999 Australian Securities & Investments Commission ("ASIC") issued a Policy

Statement governing offers of securities on the Internet.[116] The policy covers" offers, invitations and advertisements of securities . . . that appear on the Internet; and can be accessed in Australia." ASIC does not intend to regulate offers, invitations and advertisements of securities that are accessible in Australia on the Internet if: (a) the offer, invitation or advertisement is not targeted at persons in Australia; (b) the offer or invitation contains a meaningful jurisdictional disclaimer; (c) the offer, invitation or advertisement has little or no impact on Australian investors; and there is no "misconduct."

ASIC emphasized that it did not generally seek to regulate offers, invitations and advertisements that have no significant effect on consumers or markets in Australia. It observed that if every regulator sought to regulate all offers, invitations and advertisements for financial products that were accessible on the Internet in their jurisdiction, the use of the Internet for transactions in financial products would be severely hampered.[117]

ASIC noted that since an offer is made in Australia if it is received in Australia, its securities laws could apply to an offer or invitation of securities on an Internet site accessible from Australia irrespective of where the offeror is located.[118] Moreover, since the work "offer" is not limited to a technical or contractual meaning, but includes the distribution of material that would encourage a member of the public to enter into a course of negotiations calculated to result in the issue or sale of securities, the implications are significant.[119]

ASIC requires that the offering material and advertisements not be "targeted" at persons in Australia and that they contain a "meaningful jurisdictional disclaimer."[120]

In order not to target persons in Australia, ASIC set forth the following safeguards:

(a) *Precautions reasonably designed to exclude subscriptions being accepted from persons resident in Australia and to check that the precautions are effective by monitoring the number of applications made (if any) by persons resident in Australia.* Examples of precautions are not sending notices to, or not accepting applications from, persons whose telephone numbers, postal or electronic addresses or other particulars indicate that they are resident in Australia.

(b) *The offering material or advertisement must not be published, distributed or made available in ways or locations which are calculated to draw it to the attention of Australian residents.* This includes, for instance, electronic mail to addresses which indicate that the notice will be read in Australia, posting to newsgroups in the aus.* hierarchy and web sites maintained in Australia, or with Australian content.

(c) *The offering material or advertisement must not contain material which is specifically relevant to Australian residents or investors.* Factors that would lead to such a conclusion include details of Australian tax treatments or rates, or information presented in Australian dollars.

(d) The offer or invitation to which the offering material or advertisement relates must not be made or issued in Australia by any other means absent some other exemption from the Australian laws.

ASIC also outlined the requirements of Class Order ["CO 99/43"] for a meaningful jurisdictional disclaimer are:

(a) "*The offering material must contain a statement that the offer or invitation to which it relates is not available to Australian residents*. This may be explicit, or it may be conveyed by a statement that the offer or invitation is available only to residents of certain other countries, naming them. A statement that

"the offer is not being made in any jurisdiction in which the offer could or would be illegal" does not satisfy our requirement. This is because it does not clearly state the jurisdiction in which the securities are available.

(b) "*The statement must be prominently displayed with the offering material*. A disclaimer could not be said to be effective if a potential investor could overlook it or did not see it until after they had decided to invest."

ASIC said it would also be concerned if an Internet offer, invitation or advertisement has a significant effect on consumers or markets in Australia. Whether or not an offer has a significant effect in any particular case will depend upon the facts of that case. Examples of the types of factors which we would consider in determining whether an Internet offer, invitation or advertisement has a significant effect on consumers or markets in Australia include the number of:

(a) enquiries that an issuer receives from Australian investors about investing in the securities being offered;

(b) Australian investors to whom securities are issued;

(c) complaints which we receive from Australian investors.[121]

Accordingly, if ASIC believes that an Internet offer, invitation or advertisement has had a significant effect on consumers or markets in Australia, it will consider taking regulatory action on the basis that the offeror may not have complied with the requirements of Class Order [CO 99/43], even if the offeror used safeguards or disclaimers. Thus "it may be that the safeguards and disclaimers were either so poorly designed as to be ineffective, or were used to provide the appearance of satisfying the requirements of Class Order [CO 99/43] without real compliance."[122]

Finally, if those responsible for an Internet offer, invitation or advertisement of securities (or involved in its publication) appear to have been involved in any "misconduct," ASIC will consider the means available to remedy that conduct, whether it occurred in Australia or overseas. "Misconduct" may involve significant non-compliance with Australian or overseas laws, such as fraudulent, misleading or deceptive conduct, or failure to abide by other regulatory requirements, such as inadequately disclosing the jurisdictions in which the offer is intended to be made.

ASIC also plans to continue working with international regulators to seek a constant approach on issues relating to the use of the Internet to make available offers, invitations and advertisements of securities. In particular, we will continue our active participation in the work of the International Organisation of Securities Commissions (IOSCO).[123]

9. India.

India has no specific laws regarding Internet jurisdiction. However, its relevant laws on international commercial contracts confer jurisdiction on foreign courts to adjudicate disputes between the parties. Under Indian law, in breach of contract cases, the cause of action arises in any of the following places:

(a) The place where the contract is made;

(b) The place where the contract is to be performed, or the performance thereof is completed;

(c) The place where in performance of the contract any money to which the suit relates is payable; or

(d) The place where revocation takes place.[124]

Where two or more courts have jurisdiction under the CPC to try a particular suit, an agreement between the parties that any dispute between them will be tried in one of such courts is binding in India.[125] Therefore, courts will ordinarily compel parties to abide by these agreements.[126] Thus, where a contract has been executed in Bombay but the money under the contract is payable in Calcutta, the parties can agree that the dispute between them shall be tried either by the courts in Bombay or Calcutta.

While the intention of parties is usually given primacy, it is not dispositive.[127] In interpreting forum selection clauses, the following principles are applicable:

(a) The agreement must be clear and unambiguous.

(b) A unilateral declaration is ineffectual.

(c) It must appear that the party sought to be bound by the agreement had knowledge of the restrictive clause.

(d) The court may disregard the agreement is there are countervailing oppressive circumstances.[128]

(e) The court mentioned in the agreement must be one which has jurisdiction (*de hors* the agreement) to try the suit.

(f) A bare statement of jurisdiction of a court in the agreement is not enough; there should be an express exclusion of the jurisdiction of all other courts.

An agreement providing that suits relating to disputes thereunder should be filed in a court in a foreign country is not void. However, it cannot deprive an Indian court from exercising its jurisdiction. The court in India can adjudicate such a suit if it finds that the balance of convenience, interests of justice and the circumstances of the case warrant trial in India.

Indian courts generally have followed English courts with regard to recognition and enforcement of foreign forum selection clauses in international commercial contracts. Foreign companies including forum selection clauses in joint venture and other agreements should bear in mind that in spite of an overseas jurisdiction clause, they can end up litigating in India, if an Indian court opines that the interests of justice will be better served by trial in India. Thus, Indian law prescribes that where two or more courts have jurisdiction to try a particular suit, an agreement between the parties that any dispute between them will be tried in one of such courts is binding. Parties cannot by agreement confer jurisdiction on a court which does not have jurisdiction under the CPC. Moreover, under private international law forum selection clauses are valid to the extent that judgments based thereon will usually be recognized by foreign courts. However, an agreement providing that suits relating to disputes thereunder should be filed in a foreign country cannot deprive an Indian court of its jurisdiction, if the Indian court opines that the interests of justice will be better served by trial in India.

The courts of India will not question the conclusiveness of a foreign judgment, and, thus, its binding

character, unless it can be established that the case falls within one of the six exceptions to CPCS 13,[129] the legislation relevant to the recognition and enforcement of foreign judgments.[130]

IV. Future Directions and Recommendations.

Because the World Wide Web is a borderless new medium, it is too early to predict a logical worldwide regulatory scheme. Assumably, regulators in the economically advanced nations will try to augment existing coordination agreements and establish new ones to help enforce antifraud laws. Moreover, they may try to use the Internet as a tool against its abusers by posting and publicizing on the Web the identities of suspected abusers. It is also conceivable that sophisticated electronic screening mechanisms will be developed which would allow the regulatory agencies of each jurisdiction to block or impede the transfer into, or access from, its territory of offering materials that avoid compliance with local registration requirements.

A. The Convergence of Securities Laws Worldwide.

In framing any recommendations in the securities area, we should take account of the increasing degree of similarity in the substantive securities laws of different jurisdictions.[131] Securities laws typically have many common provisions, including mandatory disclosure requirements on the distribution of securities to the public,[132] ongoing mandatory disclosure requirements for post-distribution trading of securities, and prohibitions against insider trading and market manipulation.[133] Rules governing the manner in which takeover bids are made, the period over which such bids must be kept open, and the information that must be provided to offeree shareholders are also typical of regulatory regimes.[134] Securities firms are usually subject to record keeping requirements, duties to clients, minimum competency standards, and minimum capital requirements that are enforced, in part, through licensing requirements.[135]

Frequently, similarities result from copying; for example, aspects of Malaysian and Singaporean securities laws dealing with both disclosure and continuous disclosure requirements were borrowed from the Australian uniform companies acts, which in turn were patterned in many respects after the United Kingdom's Companies Act 1948.[136] Takeover bid provisions in Malaysia and Singapore are based primarily on the London City Code on Takeovers and Mergers.[137] SEC Rule 10b 5 in the United States was copied by both Singapore and Malaysia. The American occupation of Japan after World War II led to Japan's adoption of a securities regulation schema modeled on the U.S. Securities Act of 1933 and the Securities Exchange Act of 1934. Id. at 92.[138]

There are various theories advanced as to why such similarities in securities laws has evolved. Perhaps some solutions are similar because they are the best solutions. Similarities may result from increased competitive pressures associated with attracting investment capital, because of increasing internationalization of securities markets.[139] Other factors cited for convergence of securities laws include pressures from U.S. regulators to have U.S. style laws adopted in other countries, geographical proximity of certain countries, the sharing of a common language, and close business or educational contracts.

Among all the foregoing factors, two bear special attention in light of the Internet: (1) increased international competition and (2) language. There is a significant trend toward the "globalization" of securities markets in recent years, with issuers of securities making offerings in countries other than their

home countries,[140] and investors increasingly investing in foreign markets. Funds tend to move to the country that is perceived to provide the best return on investment for a given level of non-diversifiable risk. The result is greater political pressure on policymakers to provide conditions that will encourage investment by both residents and foreigners by maximizing return on investment and minimizing non-diversifiable risk. Advances in communications technology and the development of computer technology in the processing of transactions also stimulate globilization by facilitating the trading of securities and the settlement of securities transactions in remote markets. New types of securities, such as derivative securities, have been used to achieve the benefits of international diversification while circumventing local restrictions on foreign ownership with smaller levels of investment.[141]

A characteristic of the globalization of securities markets is greater competition between countries for investment funds. This in turn tends to place additional pressure on countries to adopt securities laws that will be perceived to be the most likely to attract investment funds. Thus, the potential flight of funds and securities business from the United States and Canada to other less heavily regulated jurisdictions has been cited as a significant factor in the development of shelf registration, Regulations S, and Rule 144A in the United States, and the development in Canada of prompt and shelf offerings and the multijurisdictional disclosure system.[142]

The second special element to be considered is the effect of sharing a common language. Arguably, there is a tendency to copy the laws of a country whose securities laws can be more readily ascertained because they are set out in a language that is understood in the country borrowing the securities laws. Sharing a common language may also affect the way people think about securities law issues. English has arguably taken a dominant position in the world. English particularly dominates the World Wide Web. This may contribute to a convergence of ideas that are linked to the way problems are conceived of in English. The dominance of English may also facilitate the adoption of securities laws from other English-speaking countries, such as the United States or the United Kingdom. Many countries have a group of persons who are sufficiently conversant in English to read the securities laws of English speaking jurisdictions, making the laws of these jurisdictions more accessible than those of other jurisdictions.

The significance of the worldwide convergence of securities laws is this: such convergence tends to reduce the size of the stake that any given nation has in having its own laws applied. Thus, regulators in the U.S. feel less discomfort about a U.K.—based scam that impacts on U.S. residents if they know U.K. regulators are enforcing parallel sanctions.

B. Recommended Approach to Jurisdictional Criteria.

It is important to promote Internet use in the securities field to gain all the benefits of the individual empowerment, price transparency and other efficiencies that it can offer. The integrity of securities markets is just as critical in a global marketplace as it was before the Internet. Yet we must be careful to avoid jurisdictional models that ignore the dramatic change in how business is and will be done. Traditional tests should therefore be reexamined.

1. Reexamine the Direction Test.

One trend in jurisdiction cases has been to focus on the place where information on securities is directed. This has been a traditionally-based approach, followed not only by the SEC[143] and NAASA in the U.S., but by the Australian Securities Commission and by the CSA in Canada.[144] The question is

whether this approach will fit the Internet two years down the line, where highly sophisticated robots will be moving through a wholly non-geographic virtual "space" to both communicate and transact business, frequently with other robots, and without human intervention.

For an investor to engage in the use of robots and other non-geographically grounded intermediaries is somewhat like sending a note in a bottle out to sea: it becomes harder to argue that the note writer's home jurisdiction should control in preference to the residence of whoever picks up the note or the place where it is picked up. By like token, a web participant who unleashes a 'bot into a digital environment awash with other robots and virtual proxies has voluntarily "left" his or her geographical and elected to travel and transact in a wholly different environment. It is harder to argue that such a person can have a reasonable belief that the laws or the courts of the home jurisdiction will apply.

We should carefully examine whether it would make more sense downstream to create a modified "continuum" that enlarges upon the horizontal continuum articulated in the "Zippo" case.[145] The new continuum would not be based solely on the "passive-interactive" gradations of Zippo. Instead, it would also include a vertical component, based on how far the process is removed from direct human involvement. For example, processes involving cyber-robots are more likely to be removed from direct human involvement and arguably should be scrutinized differently. Because of the sophistication of the environment in which the 'bots operate, jurisdiction should be highly consensual, i.e., affected by any and all click-wrap terms or conditions imposed or accepted by the 'bots. In the absence of click-wrap acceptance, an activity by a 'bot representing someone in Forum A should not necessarily establish jurisdiction in Forum A when the 'bot deals with another 'bot in Forum B. This would, in a way, be the obverse of the stream of commerce theory: a person who sends a 'bot into the Internet world can be deemed to foresee that, absent understandings to the contrary, it would be engaging in transactions that subject the person to the laws and courts of foreign jurisdictions.

2. Reexamine Aspects of "Targeting".

Applying traditional principles of securities jurisdiction, jurisdiction is being extended to persons who use the Internet to "target" residents of a given jurisdiction. Along with access to information, other factors that may apply include:

(a) Specific Transactions Directed to the Jurisdiction. If a person located outside a given jurisdiction uses a Website to conduct transactions with residents of that jurisdiction, the Web site operator has "availed" itself of the jurisdiction and should reasonably expect to be subject to its courts in matters relating to the transactions. But a 'bot dealing with other 'bots and avatars is not necessarily "availing" itself of a jurisdiction.

(b) Push Technology. The conscious pushing of information into a given jurisdiction, whether by a 'bot or any other complex of agents, should be viewed as targeting activity that warrants jurisdiction. Here, technologies will be available to track 'bots and determine if there is a pattern of pushing.

(c) Language. The selection of language on which information is cast is also relevant to the "targeting" issue. At present, approximately 80% of Internet communication is conducted in English (even though that may be expected to decrease over time).[146] This, together with the fact that English is the standard commercial language, make its use on a Web site insufficient ordinarily to establish jurisdiction of an English-speaking country. However, an Internet offering in Tagalog may reasonably be considered to be targeted at Philippines investors, just as offerings in Dutch are considered in the

Netherlands to be offered to its residents.

However, when 'bots are introduced into the equation, the picture is altered. A robot need not communicate in any human language. Conversely, a 'bot could be programmed to communicate in every principal language. Thus, languages other than English become less evidence of targeting.

(d) Currency. When the offering price of securities is quoted in a currency other than that of the issuer's place of incorporation, this is arguably some evidence of "targeting." Currencies such as the EU are intended to be generic and should not be evidence, taken alone, of targeting any jurisdiction. Nor should widely-used currencies be seen, taken alone, as evidence of targeting. For example, U.S. dollars are almost akin in their pervasiveness to the use of English on the Internet. Pounds Sterling and Swiss Francs are likewise universal currencies. However, the U.K., as discussed earlier (Subsection II.B.2., supra) takes the position that quoting projections in Pounds Sterling is one indicator of targeting persons in the U.K. If an offer is expressed in Spanish Pesetas and available in Spain, Spanish law should likely apply. On the other hand, an offering expressed in Spanish Pesetas and accessed in Italy would probably not be deemed directed to Italian offerees.

As robots and agents proliferate, they change the significance of this factor as well. They will be able to translate one currency into another in a nanosecond, making currency identification less of a significant factor.

(e) Tax and Special Laws. If Internet securities information which goes into detail on the tax laws or other laws of a particular nation could be deemed targeted to that particular audience. The SEC Release No. 33 7516 provides an example by pointing out that, regardless of the precautions adopted, if the content appeared to be targeted to the U.S. (e.g., by a statement emphasizing the investor's ability to avoid U.S. income tax on the investments) then it would view the Web site as targeted at the U.S. Arguably, the intervention of robots and agents would not affect this factor.

(f) Pictorial Suggestions. A French Franc denominated offering made on a background of the Eiffel Tower might be said to be aimed at French investors. But can they be said to be aimed at a French investor's multilingual robot? The answer would depend on how nearly the 'bot's information system was programmed to include the principal's patriotic sensibilities.

(g) Disclaimers. Disclaimers are already a regular part of international paper-based securities offerings. While typically lengthy with respect to U.S. securities laws, disclaimers are often much shorter and less specific for other jurisdictions and may amount to no more than a statement that an offer is not made in any jurisdiction in which it would be illegal to make an offer unless registered. The SEC Release comments: "The disclaimer would have to be meaningful. For example, the disclaimer could state, "This offering is intended only to be available to residents of countries within the European Union." Because of the global reach of the Internet, a disclaimer that simply states, "The offer is not being made in any jurisdiction in which the offer would or could be illegal," however, would not be meaningful. In addition, if the disclaimer is not on the same screen as the offering material, or is not on a screen that must be viewed before a person can view the offering materials, it would not be "meaningful."[147]

The proliferation of robots could actually make the use of disclaimers even more meaningful. Common types of software protocols could efficiently screen out properly-programmed 'bots before they even accessed a screen. Acting sort of like a long-range radar, the disclaimers would deter certain 'bots from

even approaching certain areas of cyberspace.

3. Reexamine the "Effects Test.

Courts have also applied the effects test in cyberjurisdictional cases. They have invoked forum jurisdiction when the conduct can be found designed to have an impact in the forum (e.g., the Panavision case). We should require clear evidence of an intended impact before making a foreign entity subject to forum jurisdiction. Just because there is an effect does not mean the effect was actually intended, when a piece of data can be circulated millions of times over in a matter of seconds.

4. We Must Push for International Cooperation.

We must develop international coordination of securities regulation and enforcement. An obvious focus for such coordination is the International Organization of Securities Commissioners ("IOSCO"). However, in securities as in other fields, it may be necessary to seek a more binding kind of regulation, such as that available through the treaty power (e.g., the kind of enforcement exerted by WTO or under NAFTA and GATT).

The Internet will evolve so far away from geographical foundations that an entirely new international regulatory scheme should be constructed. As part of this new system, nations and states may have to surrender some kinds of local preferences to achieve uniformity, as has happened in worldwide intellectual property protection. The great developments in communication—moveable type, telegraphy, telephony—have historically led to less localism and more similarity in commercial laws. The Internet is another giant step in that historical direction. The difference lies in the stunning speed with which this newest step is reshaping communication. The world community must therefore proceed with all due speed to address the heightened need for uniformity, both in substance and application, of worldwide securities laws.

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[1]It is understood that this section will become redundant when the topics of all the various working groups are blended into the Master Project Paper.

[2]See stipulated facts regarding the Internet in American Civil Liberties Union v. Reno, 929 F. Supp. 824, 830-32 (E.D. Pa. 1996).

[3]D. Johnson and D. Post, Law and Borders—The Rise of Law in Cyberspace, 48 STAN. L. REV. 1367, 1371 (1996).

[4]The Internet also uses "caching," i.e., the process of copying information to servers in order to shorter the time of future trips to a Web site. The Internet server may be located in a different jurisdiction from the site that originates the information, and may store partial or complete duplicates of materials from the originating site. The user of the World Wide Web will never see any difference between the cached materials and the original. American Civil Liberties Union v. Reno, supra note 195, 929 F. Supp. at 848-49.

[5]One of the results will be to shrink the size and cost of an incredibly expanding range of communications devices. Bell Labs, for example, has a camera on a chip and a microphone on a chip.

[6]RESTATEMENT (3RD) OF THE FOREIGN RELATIONS LAW OF THE U.S. §401, comment a (1987).

[7]Id. 230-31.

[8]Id. 236-37.

[9]Id. §402.

[10]Id. §403(1). In addition, §403(2) enumerates different factors which have to be evaluated in determining the reasonableness of assertion of jurisdiction: (1) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (2) the connections, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (3) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (4) the existence of justified expectations that might be protected or hurt by the regulation; (5) the importance of the regulation to the international political, legal, or economic system; (6) the extent to which the regulation is consistent with the traditions of the international system; (7) the extent to which another state may have an interest in regulating the activity; and (8) the likelihood of conflict with regulation by another state.

[11]G. Born, Reflections on Judicial Jurisdiction in International Cases, 17 GA. J. INT. & COMP. LAW 1, 33 (1987); see Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 115 (1987).

[12]International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945) ("International Shoe") (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[13]See, e.g., Grutowski v. Steamboat Lake Guides & Outfitters, Inc. 1998 WL 9602 (E.D. Pa.), ___ F. Supp. 2d _____; McDonough v. Fallon McElligott, Inc., 40 U.S.P.Q.2d 1826 (S.D. Cal. 1996); IDS Life Insurance Co. v. Sun America, Inc., 1997 W.L. 7286 (N.D. Ill. 1997). These cases reject general

jurisdiction over a defendant based on advertising on the Web, where the matters complained of had nothing to do with the Web presence or the advertising. In California Software, Inc. v. Reliability Research, Inc., 631 F. Supp. 1356 (C.D. Cal. 1986), defendants wrote messages to several California companies via a bulletin board and communicated with three California residents via telephone and letters, allegedly denigrating plaintiffs' right to market software. The Court held that general jurisdiction could not be based on the "mere act of transmitting information through the use of interstate communication facilities," where defendant had no offices in California and did not otherwise conduct business there except to communicate with California users of the national bulletin board; 631 F. Supp. at 1360 (The court did find specific jurisdiction). In Panavision International, L.P. v. Toeppen, 938 F. Supp. 616 (C.D. Cal. 1996), the federal court rejected general jurisdiction in California over an Illinois defendant who used a California company's trademark in a website address in order to compel the plaintiff to buy out his domain rights.

[14]International Shoe, 326 U.S. 310, 316 (1945).

[15]Core-Vent v. Nobel Industries AB, 11 F.3d 1482, 1485 (9th Cir. 1993) (citing Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir. 1987)).

[16]Calder v. Jones, 465 U.S. 783, 789 (1984).

[17]Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) (quoting Travelers Health Assn. v. Virginia, 339 U.S. 643, 647 (1950)). See also McGee v. International Life Insurance Co., 355 U.S. 220, 222-23 (1957).

[18]Burger King Corp., supra, 471 U.S. at 476. Once a nonresident has either purposefully directed activities to the forum state or has purposefully availed himself of the privilege of conducting activities in the forum, the question of fairness must be considered. The Supreme Court has articulated five separate "fairness factors" that may require assessment to determine whether or not specific jurisdiction should apply. These factors include:

1. The burden on the defendant of defending in the forum;
2. The forum state's interest in adjudicating the dispute;
3. The plaintiff's interest in obtaining convenient and effective relief;
4. The interstate judicial system's interest in efficient resolution of controversies; and
5. The shared interest of the states in furthering substantive social policies. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

[19]See, e.g., Robinson v. TCI/US West Communications, Inc., 117 F.3d 900, 904-05 (5th Cir. 1997): "[w]ith one small exception the [1934 Act] . . . does nothing to address the circumstances under which American courts have subject matter jurisdiction to hear suits involving foreign transactions.

[20]Section 5 of the 1933 Act; 15 U.S.C.A. §77e.

[21]Section 15 of the 1934 Act; 15 U.S.C.A. §78o.

[22]15 U.S.C. §78dd(b).

[23]SEC Release No. 33-6863 55 Fed. Reg. 18306 at 18309 (May 2, 1996).

[24]See Tamari v. Bache & Co. (Lebanon) S.A.L., 730 F.2d 1103, 1107-08 (7th Cir. 1984).

[25]Id. at 1108. See Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1982).

[26]RESTATEMENT (3rd) OF THE FOREIGN RELATIONS LAW OF THE U.S. §416 (1987).

[27]Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118 (2d Cir. 1998).

[28]147 F.3d at 126.

[29]Kauthar SDN BHD v. Sternberg, 1998 WL 388921 (7th Cir. 1998).

[30]Section 414(a) of the USA.

[31]Burger King Corp. v. Rudzewicz, supra, note 127, 471 U.S. at 472-76; Davis v. Metro Productions Inc., 885 F.2d 515, 520 (9th Cir. 1989) (tax shelter investment contracts sold to Arizona resident and delivered in Arizona formed constitutional basis for Arizona's long-arm jurisdiction).

[32]Section 414(c) of the USA; emphasis added.

[33]Jurisdiction was found to exist in: Archdiocese of St. Louis v. Internet Entertainment Group, Inc., 1999 WL 66022 (E.D. Mo.) ___ F. Supp. 2d ___ (1999) (operator of adult site intended to reach Missouri residents in connection with papal visit to St. Louis); GTE New Media Services, Incorporated v. Ameritech Corporation, 21 F. Supp. 2d 27 (D.C., D.C. 1998) (telephone companies increased advertising revenue by channeling District of Columbia viewers to their websites); Hasbro Inc. v. Clue Computing Inc., 1997 U.S. Dist. LEXIS 18857 (D.Mass. Sept. 30, 1997) (Rhode Island Web site operator listed Massachusetts client on its site and which was accessible to Massachusetts residents); CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cor. 1996) (repeated transmission of software and messages over the Internet to forum state); Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996); Heroes, Inc. v. Heroes Foundation, 41 U.S.P.Q. 2d 1513 (D.D.C. 1996); Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996) (191 hits by Missouri viewers on California Web site constituted "purposeful availment"); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997) (3,000 Pennsylvania subscribers to Internet news service constituted "purposeful availment"); Panavision Intern, L.P. v. Toeppen, 938 F. Supp. 616 (C.D. Cal. 1996); EDIAS Software Intern, L.L.C. v. Basis Intern, Ltd., 947 F. Supp 413 (D. Ariz. 1996) (dependent could foresee impact in the forum state of defamatory material on its Web site and e mail sent into state); Minnesota v. Granite Gate Resorts, Inc., 1996 W.L. 767432 (E. Minn. 1996) (contract provision that Web site operator could sue user of operator's services in user's home state); Resuscitation Technologies, Inc. v. Continental Health Care Corp., 1997 W.L. 148567 (S.D. Ind. 1997) (although plaintiff initiated contacts with its Web site posting, subsequent extensive e-mail and phone contacts by Michigan defendants warranted Indiana jurisdiction); California Software Inc. v. Reliability Research, 631 F. Supp. 1356 (C.D. Cal. 1986) (messages placed by Vermont residents on Web bulletin board defaming California business foreseeably caused damage in California).

Among the increasing number of cases declining to find jurisdiction are: Mid City Bowling Lanes & Sports Palace, Inc. v. Ivercrest, Inc., 1999 WL 76446 (E.D. La.), ___ F. Supp. 2d ___ (1999) (an advertisement on Web site held essentially "passive"); Pheasant Run, Inc. v. Moyse, 1999 WL 58562 (N.D. Ill.), ___ F. Supp. 2d ___ (1999) (advertisement on Web site containing defendant's telephone number); Millenium Enterprises, Inc. v. Millenium Music, L.P., 1999 WL 27060 (D. Ore.), ___ F. Supp. 2d ___ (1999) (interactive Web site was not targeted at Oregon viewers and had no significant sales in Oregon); Origin Instruments Corp. v. Adaptive Computer Systems, Inc., 1999 WL 76794 (N.D. Tex.) ___ F. Supp. 2d ___ (1999) (no jurisdiction where "moderate level" of interactivity); ESAB Group, Inc. v. Cetricut, LLC, 1999 WL 27514 (D.S.C.) ___ F. Supp. 2d ____; Cybersell Inc. v. Cybersell Inc. (9th Cir. 1997) (mere accessibility by Arizona resident to passive, Florida-based Web site); Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996) (Missouri defendant based on a Web site advertising the defendant's nightclub; no evidence that sales were made or solicited in New York or that New Yorkers were actively encouraged to access the site); Smith v. Hobby Lobby Stores, Inc., 968 F. Supp. 1356, 1365 (W.D. Ark. 1997) (no general jurisdiction where Hong Kong manufacturer of artificial Christmas tree advertised on the Web, but tree was purchased from a retailer in Arkansas); McDonough v. Fallow McElligott, Inc., supra note 126 (mere accessibility of Missouri Website by Californians insufficient for general personal jurisdiction); Hearst v. Goldberger, 1997 WL 97097 (S.D.N.Y. 1997) (no specific jurisdiction where New Jersey site was accessible to and visited by New Yorkers, where no sales of goods or services had occurred).

[34]Panavision Int'l, L.P. v. Toeppen, 1996 WL 534083 (C.D. Cal. Sept. 19, 1996).

[35]1996 WL 534083 at *5.

[36]Inset Systems, Inc. v. Instructions Set, Inc., 937 F. Supp. 161 (D. Conn. 1996).

[37]World-Wide Volkswagen, supra, note 187, 444 U.S. at 296.

[38]The use of filtering devices is theoretically possible, but the efficacy of these devices have not yet been proven. See American Civil Liberties Union v. Reno, supra, note 195, 929 F. Supp. at 844-46 (age filtering devices for sexually explicit materials under Community Decency Act); CompuServe Inc. v. Cyber Promotions, Inc., 1997 WL 109303 (S.D. Ohio 1997) (CompuServe's attempts to set up filters to keep defendant from "spamming" (sending bulk junk e-mails) thwarted by defendant's falsifying the point of origin information on its e-mail and by configuring its network servers to conceal its actual domain name); see also Bensusan Restaurant Corp. v. King, 937 F. Supp 295, 300 (S.D.N.Y. 1996).

[39]Registration Requirements for Foreign Broker-Dealers, Securities Exchange Act Release No. 27,017 (July 11, 1989).

[40]See Section 421, RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS (1987).

[41]See notes 2-7, supra and accompanying text.

[42]SEC Release No. 33-7516 (Mar. 23, 1998) ("Release 33-7516").

[43]Id., Part I. The release applied only to posting on Web sites, not to targeted kinds of communication such as e mail.

[44]See notes 59-62, infra and accompanying text for NASAA approach.

[45]Release 33-7516, Part I.

[46]Id.

[47]Id. Part III.B.

[48]Id. Part III.D.

[49]Id. Part IV.B.

[50]Id. Part V.

[51]Id. Parts IV.A., V.A.

[52]Id. Part III.B.

[53]A viewer on the National Corporate Services site who would have clicked onto the "Cuba Stock Exchange" (www.cybercuba.com/cubaexchange. html) might have been in for a surprise: it could take a minute to realize that this is not a real stock exchange, but just a hypothetical listing of companies that the "Havana Bay Company" would like to see marketed if and when capitalism returns to Cuba. However, at least one Caribbean brokerage firm in 1996 began soliciting U.S. retail clients for Internet trading. E. Huber, An Ex Regulator Talks About The Internet, SEC. IND. NEWS (Dec. 2, 1996), 1, 4.

[54]See J. Cella and J. Stark, SEC Enforcement and the Internet: Meeting the Challenge of the Next Millennium—a Program for the Eagle and the Internet, 52 BUS. LAW. 815, 834-35 (1997).

[55]See Securities Act Release No. 34-38672 (May 23, 1997), Part VII.B.2.

[56]Securities and Exchange Commission v. Wye Resources, Inc., 1997 WL 312590 (D.D.C., 1997).

[57]See SEC v. Wye Resources, Inc. and Rehan Malik, SEC Lit. Rel. No. 15198 (Dec. 26, 1996).

[58]SEC Gets Injunction Against German Resident in Net Scheme, INTERNET COMPLIANCE ALERT (Jan. 12, 1998), 2.

[59]1 J. LONG, BLUE SKY LAW (1997 rev.), §3.04[2] at 3-26, 3-27.

[60]Model NASAA Interpretive Order and Resolution, posted at NASAA's official Web site, www.nasaa.org/bluesky/guidelines/internetadv.html.

[61]See BLUE SKY L. REP. (CCH) ¶6481.

[62]The policy is available on the Internet at www.nasaa.org/bluesky/guidelines/ internetadv.html. See also Interpretive Order Concerning Broker-Dealers, Investment Advisers, Broker-Dealer Agents and Investment Adviser Representatives Using the Internet for General Dissemination of Information on Products and Services (Apr. 27, 1997) CCH NASAA Reports ¶2191. As of mid-1988, 22 states had adopted a version of the safe harbor. 1 BLUE SKY L. REP. (CCH) ¶6481.

[63]Broker-dealers, investment advisers, broker-dealer agents ("BD agents") and investment adviser representatives or associated person ("IA reps") who use the Internet to distribute information on available products and services directed generally to anyone having access to the Internet, and transmitted through the Internet, will not be deemed to be "transacting business" in the state if all of the following conditions are met:

A. The communication contains a legend clearly stating that:

(1) the broker-dealer, investment adviser, BD agent or IA rep may only transact business in a particular state if first registered, excluded or exempted from state broker-dealer, investment adviser, BD agent or IA rep requirements, as the case may be; and

(2) follow-up, individualized responses to persons in a particular state by such broker-dealer, investment adviser, BD agent or IA rep that involve either the effecting or attempting to effect transactions in securities or the rendering of personalized investment advice for compensation, as the case may be, will not be made absent compliance with the state's broker-dealer, investment adviser, BD agent or IA rep requirements, or pursuant to an applicable state exemption or exclusion; and

a. for information concerning the licensure status or disciplinary history of a broker-dealer, investment adviser, BD agent or IA rep, a consumer should contact his or her state securities law administrator.

B. The Internet communication contains a mechanism, including without limitation technical "firewalls" or other implemented policies and procedures, designed to ensure that prior to any subsequent, direct communication with prospective customers or clients in the state, the broker-dealer, investment adviser, BD agent or IA rep is first registered in the state or qualifies for an exemption or exclusion from such requirement. (This provision is not to be construed to relieve a broker-dealer, investment adviser, BD agent or IA rep who is registered in a state from any applicable registration requirement with respect to the offer or sale of securities in such state);

C. The Internet communications shall not involve either effecting or attempting to effect transactions in securities, or the rendering of personalized investment advice for compensation, as the case may be, in such state over the Internet, but shall be limited to the dissemination of general information on products and services.

D. Prominent disclosure of a BD agent's or IA rep's affiliation with a broker-dealer or investment adviser is made and appropriate internal controls over content and dissemination are retained by the responsible persons.

[64]C. Davidson, As Automation Remakes Trading, Industry Tries to Seize the Day, SEC. IND. NEWS

(Oct. 19, 1998), 2, 13.

[65]Id., 13.

[66]SFA, Board Notice 416 (Apr. 25, 1997); IMRO, Notice to Regulated Firms (May 1997).

[67]SFA Guidance Rel. 2/98 (May 1998).

[68]For elaboration, see Ogilvy Renault, "Jurisdiction and the Internet: Are Traditional Rules Enough?", July 1998, available online at http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm.

[69]Such a determination is not likely to be made unless to resolve a major conflict between the provinces and the federal government. In 1997, an exceptional conflict arose when Quebec enforced a controversial language law against a web site run by a small business. The Charter of the French Language requires French text on commercial signs in the province to be twice the size of any English text. The conflict was never adjudicated, but arose at the intersection of the presumed federal Jurisdiction over communications and the well-established provincial jurisdiction over provincially-incorporated businesses and most aspects of consumer protection. See [2]Luann LaSalle, "Language laws apply to Internet advertisements in Quebec", *The Globe and Mail*, 1998.04.28; Canadian Press, "Quebec store caught in language Web", *The Globe and Mail*, 1997.06.23. Both are available online through WestLaw.

[70]Industry Canada, "The Canadian Electronic Commerce Strategy", September 1998, available online at http://e-com.ic.gc.ca.

[71]The Call for Comments for these hearings (Telecom Public Notice CRTC 1998-20 and Broadcasting Public Notice CRTC 1998-82) is available online at http://www.crtc.gc.ca/ENG/telecom/notice/1998/p9820_0.txt, as are written submissions and transcripts of the hearings.

A formal decision has not been issued, but expectations are that the CRTC will either forbear from regulation, or impose light cultural regulation only. This might include priority placement for Canadian services on Canadian search engines and portals, or development funding through a tax on service providers.

[72]Ontario Annual Practice, R.R.O. 1990, Reg. 194, r. 17.02. Similar provisions appear in other provincial rules of procedure, and in Article 3148(3) of the Civil Code of Quebec.

[73]This is discussed more fully in Chris Gosnell, "Jurisdiction on the Net: Defining Place in Cyberspace", Canadian Business Law Journal 29.3 (February 1998) 344-63.

[74]International Shoe v. Washington, 236 U.S. 310 (1945).

[75]Morguard Investments Ltd. v. De Savoye, [1990], 3 S.C.R. 1077 (S.C.C.).

[76]Hunt v. T&N plc, [1993], 109 D.L.R. (4th) 16 (S.C.C.) at ¶58.

[77]Id. at ¶¶53, 58.

[78]The Supreme Court of Canada discussed this directly in a criminal case involving securities infractions, Libman v. R. [1985], 21 D.L.R. (4th) 174 (S.C.C.).

[79]Tolofson v. Jensen [1994], 3 S.C.R. 1022, 120 D.L.R. (4th) 289.

[80]Id. at para 42.

[81]See Gosnell, [CITE].

[82]Braintech, Inc. v. Kostiuk [1999], B.C.J. No. 622 (unreported B.C.C.A. decision, per Goldie J.A., March 18, 1999, court file no. CA024459).

[83]Craig Broadcast Systems Inc. v. Frank N. Magid Associates Inc., [1997], M.J. No. 106 (unreported decision of the Manitoba Court of Queen's Bench, per Beard J., March 11, 1997, court file no. CI 95-01-92402).

[84]Id. at para 23.

[85]Old North State Brewing Co. v. Newlands Services Inc. [1998], B.C.J. No. 2474 (unreported decision of the British Columbia Court of Appeal, per Finch J.A., October 27, 1998, court file no. CA 023872).

[86]Id. at para 31.

[87]The doctrine was recently considered and approved in Amchem v. British Columbia *(Workers' Compensation Board) [1993]*, 1 S.C.R. 897.

[88]David L. Johnston *et al, Cyberlaw* (Toronto: Stoddart, 1997) at 232.

[89]This is discussed in more detail in Ogilvy Renault, [CITE].

[90]Kitakufe v. Oloya [1998], O.J. No. 2537 (unreported decision of the Ontario Court of Justice, General Division, per Himel J., June 18, 1998, court file no. 97-CV-133151).

[91]Alteen v. Informix Corp. [1998] N.J. No. 122 (unreported decision of the Newfoundland Supreme Court, per Woolridge J., May 21, 1998).

[92]These were, *inter alia*, that it had limited operations in Canada, and none in Newfoundland; that only a tiny fraction of its business had involved direct contact with Newfoundland residents; and that a number of class actions had already been brought in California.

[93]Braintech, Inc., *supra* note 81.

[94]Braintech, Inc., *supra* note 81, at para 62.

[95]Documentation is available online at http://e-com.ic.gc.ca/english/40.htm.

[96]Federal-Provincial-Territorial Conference of Ministers responsible for the Information Highway held in Fredericton, New Brunswick, June 1998, available online at http://www.scics.gc.ca/cinfo98/83061209_e.html.

[97]Jurisdiction issues have been prominent in recent disputes such as Bre-X.

[98]Janet McFarland, "OSC shuts investment Web site," *The Globe* and *Mail,* 1997.06.21, available online through WestLaw.

[99]BSSC News Release No. 97-09 (Mar. 11, 1997).

[100]CSA Notice, Delivery of Documents Using Electronic Media Proposal - Request for Comments, 11-401 (Jun. 13, 1997).; see M. Forman, Canadians Examine Net for Confirm and Prospectus, SEC. IND. NEWS (Jun. 29, 1998), 14.

[101]Canadian Securities Administrators, Investing and the Internet, October 1998. Available online at http://www.osc.gov.on.ca/en/Investor/Csa/investing_internet.html.

[102]Canadian Securities Administrators, Request for Comments 11-401, "Delivery of Documents by Issuers using Electronic Media", January 1999. Available online at http://www.osc.gov.on.ca/en/Regulation/Rulemaking/Notices/csanotices/11-401_mcp.html.

[103]Douglas M. Hyndman, Chair, British Columbia Securities Commission, "Notice: Trading Securities and Providing Advice Respecting Securities on the Internet," NIN 97/9, 3 March 1997.

[104]Alteen, *supra* note 90.

[105]Braintech, supra note 81.

[106]Bill C-54, [CITE].

[107]Old North State, supra note 84.

[108]Karen Kaplan, Germany Forces Online Service to Censor Internet, L.A. Times, Dec. 29, 1995, at A1; Ruth Walker, Why Free-Wheeling Internet Hits Teutonic Wall Over Porn, Christian Sci. Monitor, Jan. 4, 1996 at 1; Cyberporn Debate Goes International; see also Kara Swisher, Germany Pulls the Shade On CompuServe, Internet, Wash. Post, Jan. 1, 1996, at F13.

[109]CompuServe Ends Access Suspension: It Reopens All But Five Adult-Oriented Newsgroups, L.A. TIMES (Feb. 14, 1996) at D1.

[110]The web sites for these organizations are as follows: SFC is http://www.hksfc.org.hk, SEKH is http://www.sehk.com.hk, and KHKE is http://www.hkfe.com.hk.

[111]Established in 1989, the SFC is an independent statutory body outside the civil service but still is a part of the Hong Kong Government. It is accountable to the Hong Kong Special Administrative Region, whose Chief Executive appoints the SFC's chairman and directors, for the discharge of its responsibilities, and is also responsible for advising the Financial Secretary (through the Financial Services Bureau) and the Legislative Council on all matters relating to the securities, futures and leveraged foreign exchange markets.

[112]See the Guidance Note at www.hksfc.org.hk/eng/index.htm.

[113]The Guidance Note does not cover every activity, such as trade matching facilities for financial instruments or methods of payment or fund transfer. The SEHK intends to address concerns relating to electronic application instructions for initial public offerings.

[114]For this purpose, the SFC defines "push" technology refers to any technology which spams, broadcasts, or directs information to a particular person or group of persons (*e.g.*, e mail).

[115]This guidance does not deal with the requirements governing the communication of information between listed issuers and their shareholders.

[116]ASIC Policy Statement No. 141 (Feb. 10, 1999).

[117]Id. at 141.8.

[118]Id. at 141.10; see ASIC Policy Statement 56. *Prospectus*, at [PS 56.28]; ASIC Policy Statement 107, *Electronic prospectuses* at [PS 107.18-19], [PS 107.100].

[119]Id. at 141.11.

[120]Id. at 141.13.

[121]Id. at 141.16.

[122]Id. at 141.17.

[123]Id. at 141.29.

[124]§20 of the India Civil Procedure Code, 1908.

[125]*Globe Transport Corporation v. Triveni Engineering Works*, (1983) 4 SCC 707; *Hakam Singh v. Gammon India Ltd.*, AIR 1971 SC 740; *CIDC of Maharashtra v. R. M. Mohite*, 1998(3) Mh.L.J. 223.

[126]*Ghatge & Patil v. Madhusudan*, AIR 1977 Bom 299.

[127]*All Bengal Transport Agency v. Hare Krishna Bank*, AIR 1985 Gau 7; *Snehalkumar v. ET Organisation*, AIR 1975 Guj 72.

[128]*All Bengal Transport Agency*, *id*.

[129]R. Viswanathan v. Rohn ul-Mulh Syed Abdul Wajid (1963), A I R Supreme Court, p.1.

[130]The section is substantive and not merely procedural. Moloji Nar Singh Rao v. Shanker Saran (1962), A I R Supreme Court at 1741.

[131]M. Gillen and P. Potter, The Convergence of Securities Laws and Implications for Developing Securities Markets, 24 N.C. J. Int'l L. & Comm. Reg. 83 (1998) ["Gillen and Potter"].

[132]Id. at 85 (citing S. Cohen, Comment, Survey of Registration and Disclosure Requirements in International Securities Markets, 9 MICH. Y. B. INT'L LEGAL STUD. 243 (1988)).

[133]Gillen and Potter at 87.

[134]Id.

[135]Id.

[136]Id. at 88.

[137]Id. at 91.

[138]Id. at 92.

[139]Id. at 95.

[140]Id. at 106.

[141]Id. at 107.

[142]Id.

[143]See discussion of Release No. 33-7516 , note 42.

[144]Australian Securities Commission Policy Statement 107, “Electronic Prospectuses” (Sep. 18, 1996)

[145]Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997)

[146]*The Economist*, London (Oct 24, 1997).

[147]SEC Release, footnote 21.
